Supreme Court, U.S.
FILED
APR 23 1991
OFFICE OF THE CLERK

No. 91-1707

In The

Supreme Court of the United States

October Term, 1991

IN RE
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner

Petition For Writ Of Mandamus, Prohibition Or Other Appropriate Remedy To The United States District Court Central District of California

PETITION FOR WRIT OF MANDAMUS

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April 1992

QUESTIONS PRESENTED

1. Did the district court commit clear legal error by holding, contrary to *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), that an unincorporated association with members residing in California may be sued in federal court by other California residents pursuant to diversity jurisdiction?

2. Did the district court commit clear legal error by holding, contrary to *Tuck v. United Services Auto. Assn.*, 859 F.2d 842 (10th Cir. 1988) *cert. denied* 489 U.S. 1080 (1989) and *Baer v. United Services Auto. Assn.*, 503 F.2d 393 (2nd Cir. 1974) that United Services Automobile Association [USAA], a Texas unincorporated insurance exchange, is subject to federal diversity jurisdiction?

3. Do the extraordinary circumstances of this case, premised upon the district court's patently erroneous assertion of diversity jurisdiction and exacerbated by the court's continuing threat to exercise a non-existent, illusory "inherent power" to impose sanctions against USAA in the sum of $1.7 million, mandate the exercise of this Court's peremptory intervention?

LIST OF ALL PARTIES

Petitioner UNITED SERVICES AUTOMOBILE ASSOCIATION is the defendant in district court and was the petitioner in the court of appeals.

Plaintiffs in the district court and real parties in interest in this Court are Laughlin E. Waters and Voula Waters.

William Fremming Nielsen is the Judge presiding over this action presently pending in the United States District Court, Central District of California, and is the respondent to whom the writ is sought to be directed.

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Friedenthal, Kane, Miller, *Civil Procedure*, West Publishing Co. (1985), sect. 2.6 at p.29 8

OPINIONS BELOW

The district court's order, ruling that United Services Automobile Association [USAA], an unincorporated association with 186,000 California members may be sued in federal court pursuant to diversity jurisdiction by other California residents, is reproduced in the appendix at p. A-1.

Two documents reflect the ruling of the Ninth Circuit Court of Appeals on USAA's Petition for Writ of Mandamus. The order of two judges denying the petition from writ of mandamus is reproduced at p. A-7. The dissenting opinion of Judge T. G. Nelson, urging that extraordinary relief should have been granted by the Ninth Circuit Court of Appeals to United Services Automobile Association is reproduced at pp. A-7 to A-19.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. section 1651.

OTHER PROVISIONS OF FEDERAL LAW APPLICABLE TO THIS CASE

The relevant provisions of Title 28 of the United States Code, and of Rule 11, Fed.R.Civ.P., are reproduced in the appendix beginning at p. A-734.

STATEMENT OF THE CASE

The Parties

Laughlin E. Waters, a senior judge of the United States District Court for the Central District of California, and his wife, Voula Waters, [Waters] experienced a fire at their residence in the State of California. They made a claim for fire damage to their homeowners insurance carrier, USAA. USAA is not a corporation, but instead, an unincorporated association denominated a "reciprocal insurance company," with members in all 50 states, including 186,000 members who are residents of the State of California.

Complaint Filed Pursuant to Diversity Jurisdiction In Federal District Court, Central District of California

A dispute arose between Waters and USAA regarding the insurance claim. Waters filed a lawsuit for bad faith against USAA in the United States District Court for the Central District of California, asserting diversity jurisdiction.[1] (A-33 to A-46.)

Judge William Fremming Nielsen from the Eastern District of Washington was assigned as judge of the *Waters* federal court action following recusal of Waters' colleagues from the Central District Federal Court.

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[1] Significantly, Waters did not allege USAA to be a *corporation*, rather, they alleged USAA to be a "domestic reciprocal insurance company with its principal place of business in the State of Texas." (A-34.)

Motion to Dismiss

USAA promptly moved to dismiss the *Waters* federal court action for lack of diversity jurisdiction.[2] (A-118 to A-125.)

USAA's memorandum of points and authorities in support of the motion to dismiss described the status of United Services Automobile Association as an unincorporated association with members residing in the State of California. Since Waters reside in California and since USAA has California members, the parties are not "diverse" under 28 U.S.C. 1332; thus, the federal court lacks diversity jurisdiction. (A-120.)

USAA drew the district court's attention to *Tuck v. United Services Auto. Assn.*, 859 F.2d 842, 844 (10th Cir. 1988), in which it was determined that the very defendant in the *Waters* case was an unincorporated association and was a citizen of every state in which USAA had members. In *Tuck* it was specifically determined that since USAA had members in the State of Oklahoma and was being sued in that case by Oklahoma residents, diversity jurisdiction did not exist. (A-120.)

USAA's papers relied on *Carden v. Arkoma Assocs.*, 494 U.S. 185, 110 S.Ct. 1015 (1990), in which this Court ruled that "to determine, for diversity purposes, the citizenship of an artificial entity, the court [must] consult the citizenship of . . . all of the entities' members." (*Carden, supra*, 110 S.Ct. at 1021.) USAA pointed out in its reply

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[2] Waters filed the federal court action on July 5, 1991. USAA moved to dismiss the complaint for lack of subject matter jurisdiction on July 28, 1991.

memorandum in support of its motion to dismiss that Justice Scalia, writing for the Court in *Carden*, emphatically noted "that while corporations have been considered citizens of the state of their incorporation since at least 1844, the court has 'firmly resisted extending that treatment to other entities.' " (USAA's Reply Memorandum in Support of Motion to Dismiss . . . reproduced in the appendix at p. A-398, quoting *Carden*, 110 S.Ct. at 1018.)

Among other authorities, USAA further cited *Baer v. USAA*, 503 F.2d at 393 (2d Cir. 1974), wherein the court of appeals, sua sponte, ruled that USAA must be regarded as an unincorporated association. Like the court in *Tuck v. United Services Auto. Assn., supra*, the Second Circuit ruled that since USAA had members who were citizens of the same state as the plaintiff, plaintiff's federal court action was required to be dismissed for lack of subject matter jurisdiction. (A-399 to A-400.)

Opposition to Motion to Dismiss and Request for $1.7 Million in Sanctions

Waters responded to USAA's motion to dismiss for lack of subject matter jurisdiction with an "Opposition to Motion to Dismiss and Request for Sanctions." (Reproduced in the appendix at pp. A-126 to A-165.) Waters pointed to a list of 172 previous lawsuits, unrelated to the Waters case, going back almost twenty years, mostly predating the 10th Circuit in *Tuck* and the United States Supreme Court decision in *Carden*, where USAA had either submitted to or initiated federal court litigation. Waters requested almost $2 million in sanctions under

Rule 11 and under "the inherent power" of the court for USAA's assertion of or acquiescence to federal jurisdiction, despite the fact that USAA's stand on jurisdiction had, in *none* of the 172 cases themselves, led to sanctions against USAA. (A-166 to A-393.)

Waters urged that, despite *Tuck, Baer,* and *Carden,* it had never truly been determined that USAA was an unincorporated association which could not be sued under diversity jurisdiction by a resident of any state where USAA had members. (*See,* A-153 to A-156.)

Waters requested, and the district court ordered, further briefing to determine whether (1) Waters could sue USAA pursuant to diversity jurisdiction; and (2) whether USAA should be sanctioned for submitting to or asserting diversity jurisdiction over the past 20 years. (*See,* A-155 to A-156, A-451 to A-453.)

Decision of the District Court

The district court ruled that, contrary to *Tuck, Baer* and *Carden,* USAA is a *corporate-like* entity that may be sued in federal court under diversity jurisdiction. (A-5.)

The district court further ruled that Waters' motion for sanctions would continue under advisement and set a sanctions hearing date of May 14, 1992. (A-5, A-656.)

The district court also *opened discovery* on the sanctions question. USAA has been ordered to produce various sets and subsets of documents from the court files, attorney files and claim files in the 172 previous cases.

Trial has been set in the underlying bad faith case for June 22, approximately one month after the scheduled hearing on imposition of sanctions. (A-656.)

Request For Certification and For Stay

USAA moved the district court to *certify for immediate appeal* the district court's order denying USAA's motion to dismiss for lack of diversity jurisdiction. (A-602 to A-629.)

USAA also moved to stay the proceedings in district court during the period while either (1) the certified question was immediately appealed; or (2) if certification were to be refused, then while USAA petitioned the Ninth Circuit Court of Appeals for a writ of mandamus. (A-630 to A-639.)

The district court refused to certify the jurisdiction question for immediate appeal and denied the request for stay.

Petition for Writ of Mandamus In The Ninth Court of Appeals

USAA petitioned the Ninth Circuit Court of Appeals for a writ of mandamus to direct the district court to dismiss the *Waters* action for lack of diversity jurisdiction. (A-688 to A-720.) USAA also moved the court for an emergency stay of proceedings. (A-721 to A-733.)

On March 13, 1992, the court of appeals issued its order, two judges concurring and one dissenting, denying USAA's petition for writ and denying the stay as moot. (A-7.)

Judge T. G. Nelson, on March 26, 1992, issued a separate dissenting opinion, concluding USAA had established a "compelling case" for mandamus relief which *should have been granted.* (A-19.) He noted that USAA *properly* moved to dismiss the *Waters* case because USAA is an unincorporated association with 186,000 members in the State of California and thus cannot be sued under diversity jurisdiction by the Waters, who are also California residents. Judge Nelson characterized the district court's ruling that diversity jurisdiction exists in this case as "clearly erroneous." (A-12.) Most significantly, he pointed out that the usual remedy of appeal is woefully inadequate in this case and that "USAA has stated not only a justiciable claim for extraordinary relief by mandamus, it [USAA] *has stated a compelling case for [mandamus].*" (A-19, emphasis added.)

Because USAA's conduct has been proper *in this case,* i.e. properly moving to dismiss this case where diversity jurisdiction is lacking, because the district court has no jurisdiction over this case at all, and because USAA is facing sanctions requested at $1.7 million for its conduct in previous, *unrelated* litigation that did not occur before this judge, together with the uncertainty imposed on USAA by conflicting decisions on its status from various courts of appeals, relief by a writ of mandamus is urgent, appropriate, and necessary.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE DISTRICT COURT IS CLEARLY ERRONEOUS; THE FEDERAL COURT HAS NO SUBJECT MATTER JURISDICTION OVER THIS CASE

A district court may have jurisdiction to decide a case or controversy between citizens of different states. 28 U.S.C. section 1332(a) provides as follows:

> "(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000 . . . and is between –
>
> (1) citizens of different States;. . . . "

The established corollary to the statutory provision stated above is that a district court may *not* exercise diversity jurisdiction where the plaintiff and the defendant in the action are citizens of the *same state*. (*See, Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed. 435 (1806); Friedenthal, Kane, Miller, *Civil Procedure*, West Publishing Co. (1985), sect. 2.6 at p. 29.)

Accordingly, Waters cannot sue USAA in federal court pursuant to diversity jurisdiction if Waters and USAA are both considered citizens of the State of California.

A. The United States Supreme Court in *Carden v. Arkoma Assoc.*, 494 U.S. 185 (1990) Established That While a Corporation is Treated as a Citizen of the State Which Created It, the Citizenship of Other Artificial Entities is Determined by Reference to the Citizenship of its Partners or Members

This Court in *Carden v. Arkoma Assoc.*, 494 U.S. 185, 110 S.Ct. 1015 (1990), ruled that only *corporations* may be considered juridical persons characterized as citizens of the state in which they were created. This Court observed that it had refused to extend that treatment to other artificial entities with one particular exception that has been limited to its facts. This Court stated:

> "While the rule regarding the treatment of corporations as 'citizens' has become firmly established, *we have* (with an exception to be discussed presently) *just as firmly resisted extending that treatment to other entities.*" (*Carden, supra,* 110 S.Ct. at 1018, emphasis added.)

The singular exception to the rule that only true corporations may be treated as citizens of the state in which they were incorporated is found in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), which held that the entity known as sociedad en comandita, created *under the civil law of Puerto Rico*,[3] could be treated as a citizen of

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[3] The district court here failed to articulate and therefore presumably failed to recognize the fundamental analytical differences concerning juridical status of artificial entities created under common law compared to those created under civil law. *Russell* itself is emphatic in its rationale of such distinction, viz: "The tradition of *the common law* is to treat as legal persons

(Continued on following page)

Puerto Rico for purposes of determining federal court jurisdiction. (*Carden, supra,* 110 S.Ct. at 1018.) The Supreme Court had previously ruled in a unanimous opinion in *Steelworkers v. R.H. Bouligny, Inc.*, 382 U.S. 145, (1965) that the *Puerto Rico* decision regarding the sociedad en comandita was *limited to its facts* and that the doctrinal wall limiting corporations, *only*, to treatment as juridical persons "would not be breached." (*Carden, supra,* 110 S.Ct. at 1018.)

Since at least 1900, with the single exception of the sociedad en comandita, it has been the rule that artificial entities, although possessing some of the characteristics of a corporation, may *not* be deemed citizens under the jurisdictional rule established for corporations. (*Carden, supra,* 110 S.Ct. at 1018, citing *Great Southern Fire Proof Hotel Co. v. Jones,* 177 U.S. 449 (1900).)

In the present case the district court ruled that although USAA is not a corporation it has sufficient corporate traits and a "corporate-like personality" so as to enable the courts to treat USAA like a corporation for diversity jurisdiction purposes, just as the sociedad en comandita was treated as a corporation in *Puerto Rico v. Russell, supra.* (A-5.)

The district court in this case recognized that *Baer v. United Services Automobile Assn., supra,* and *Tuck v. United*

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only incorporated groups and assimilate all others to partnerships. (Citations omitted.) The tradition of *the civil law,* as expressed in the Code of Puerto Rico, is *otherwise.*" (*Puerto Rico v. Russell & Co., supra,* 288 U.S. at p. 479, emphasis added.)

Services Automobile Assn., supra, both determined that USAA could not be treated as a juridical person for purposes of diversity. However, the district court refused to apply those cases, incorrectly concluding that this Court's decision in *Carden* permits an unincorporated association, such as USAA, to be treated as a juridical person for diversity purposes in that USAA has certain corporate-like characteristics. (*See,* A-5.)

Judge Nelson, in his dissent from the Ninth Circuit Court of Appeals' denial of USAA's petition for mandamus summed up the clearly incorrect decision of the district court in this case as follows:

> "*The district court decision is clearly erroneous.* In my view, the district court has either misread or refused to apply controlling Supreme Court and Ninth Circuit precedent on the issue of diversity jurisdiction over unincorporated associations. . . . ¶ [The district court's] dismissal of *Carden* and *Bouligny,* not to mention *Baer* and *Tuck,* is simply insupportable." (A-12 to A-15, emphasis in original.)

B. Two Federal Appeals Courts Have Ruled That USAA, the Very Defendant in This Case, is an Unincorporated Association Which is a Citizen of Each and Every State In Which USAA Has Members

In *Baer v. USAA,* 503 F.2d 393 (2d Cir. 1974) the court of appeals, sua sponte, raised the diversity jurisdiction issue and held that USAA is an unincorporated association and should be considered, for diversity purposes, to be a citizen of each state in which USAA has members. (*Baer, supra,* 503 F.2d at 395-396.)

The *Baer* court specifically examined the organization of United Services Automobile Association under the Texas statutes and ruled that USAA is not a corporation but instead, a type of association denominated a reciprocal insurance exchange. The *Baer* court observed:

> "For the purpose of determining whether diversity jurisdiction exists, *unincorporated associations* have long been considered to be citizens of each and every state in which the association has members. Thus, if the unincorporated association party to a lawsuit has any member whose state citizenship coincides with the state citizenship of any of the opposing parties in the lawsuit, *a federal district court has no diversity jurisdiction.*" (*Baer, supra,* 503 F.2d at p. 395, emphasis added.)

The *Baer* court, accordingly, remanded the case to the district court with directions to dismiss the *Baer* complaint against USAA for lack of subject matter jurisdiction.

In *Tuck v. USAA,* 859 F.2d 842 (10th Cir. 1988), *cert. denied,* 489 U.S. 1080 (1989), the Court of Appeals for the Tenth Circuit reexamined the identical issue with respect to USAA and agreed with *Baer,* as follows:

> " 'For purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association.' [Citations omitted.] . . . ¶ This is not the first time that USAA has faced this problem. In *Baer v. United Services Automobile Ass'n,* 503 F.2d 393 (2d Cir. 1974), plaintiff Baer appealed a judgment in favor of USAA to the Second Circuit. The Court of Appeals raised the question of jurisdiction sua sponte, and after a

> careful evaluation of USAA's status under Texas law, determined that, for diversity purposes, USAA was properly considered a citizen 'of each and every state in which [it] has members.' [Citation omitted.] The Tucks offer nothing that persuades us to depart from the holding in *Baer*. Accordingly, we are forced to conclude that, as the case now stands, there is not complete diversity among the parties and subject matter jurisdiction is lacking." (*Tuck, supra,* 859 F.2d at 844-845.)

The court of appeals in *Tuck* noted that even after the *Baer* decision USAA had either sued or been sued in federal court. The *Tuck* court stated that it *expected USAA to move to dismiss all pending diversity litigation.* (*Tuck, supra,* 859 F.2d at 845, fn.3.)

II.

RELIEF VIA EXTRAORDINARY WRIT IS REQUIRED IN THIS CASE

A. The Remedy of Mandamus is Particularly Appropriate Where, as Here, the District Court has Improperly Asserted Jurisdiction But Where, In Fact, the District Court has No Jurisdiction Over The Case

This Court has ruled that the remedy of mandamus is appropriate in those cases where inferior courts, such as the district court in this case, have engaged in a usurpation of power and where the district court must be confined to the lawful exercise of its prescribed jurisdiction.

> "[The remedy of *mandamus*] *has traditionally been used* in the federal courts only *to confine an*

> *inferior court to a lawful exercise of its prescribed jurisdiction* or to compel it to exercise its authority when it is its duty to do so." (*Kerr v. United States District Court*, 426 U.S. 394, 402 (1976), emphasis added.)

This Court will issue mandamus where the case involves special circumstances or a question of public importance to restrain a district court from further exercise of jurisdiction where, in fact and in law, the district court has no such jurisdiction. (*See, e.g., Ex Parte Republic of Peru*, 318 U.S. 578 (1943).)

The district court has in fact and in law improperly asserted diversity jurisdiction in this case. Two federal circuit appeals courts have ruled that USAA, the very defendant in this case, is an unincorporated association which cannot be sued pursuant to diversity jurisdiction by a resident of any state where USAA has members from the same state. Since the Waters are California residents and since USAA has 186,000 members in the State of California, diversity jurisdiction is lacking. Moreover, the federal court of appeals in *Tuck v. United Services Automobile Association, supra*, has observed that USAA is *expected to*, or required to, move to dismiss cases such as the present one where diversity jurisdiction is lacking.

If there were any doubt about USAA being "construed" as a corporation because it may have some corporate-like attributes, that doubt was erased when this Court ruled in *Carden v. Arkoma Associates, supra*, that a "corporation" for diversity purposes was to be strictly construed and that the "doctrinal wall" prohibiting corporate-like entities from being dubbed "corporations" for

diversity jurisdiction purposes could not and would not be breached.

Thus, because the district court has acted outside its jurisdiction in continuing to allow the *Waters* case to proceed in federal court, mandamus should issue to order the district court to dismiss this action and confine the district court to the lawful exercise of its *prescribed* jurisdiction.

B. This is an Exceptional Case of Public Importance Which Requires this Court's Intervention via Mandamus in Order to Enforce This Court's Appellate Jurisdiction

1. The District Court, Without Jurisdiction to Hear This Case, is Acting Further Beyond Its Authority by Ordering Discovery Regarding USAA's Position on Diversity Jurisdiction in 172 Previous Cases and By Entertaining Waters' Motion for Sanctions, the Hearing On Which Is Scheduled for May 14, 1992

The pendency of a hearing on Waters' request for $1.7 million in sanctions for USAA's purported conduct on the subject of diversity jurisdiction in 172 previous, and unrelated, cases makes this a particularly critical and exceptional case requiring this Court's intervention via mandamus.

Judge Nelson in his opinion made the point regarding the exceptional nature of this case:

> "In addition, *USAA is exposed to both the necessity to litigate, and the potential for imposition of sanctions* by the district court here for doing no more than legitimately raising an issue relating to the

district court's jurisdiction. *USAA will be faced with justifying or explaining its position in those 172 cases, dating back* to *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974). In addition to the costs associated with the trial itself, the sanctions effort exposes USAA to further fruitless effort since the court has no subject matter jurisdiction. *This is an unusual situation for a litigant to find itself in and is an element of prejudice which does not arise in the routine or garden variety struggle over subject matter jurisdiction."* (Judge T. G. Nelson's Dissent to the Ninth Circuit Court of Appeals denial of USAA's Petition for Writ of Mandamus, p. 5, reproduced in the appendix at p. A-12, emphasis added.)

And again:

"[Waters] appear intent on not only vindicating their own wrongs, but in the process, cleaning up USAA's act by seeking $1.72 million in sanctions for its conduct in dozens of other cases unrelated to theirs.

USAA may need a cathartic experience such as Waters intend to give it. The propriety of any such sanctions is not before us. Since the district court lacks jurisdiction, and USAA's motion did no more than point that out, the propriety of sanctions is not for that court, either. *What USAA does not need is to undergo the ordeal it faces in a court without subject matter jurisdiction. The district court does not need to expend its efforts and the parties' time and money in pursuing a case which is so clearly outside its authority."* (Dissenting Opinion of Judge T. G. Nelson, supra, pp. 11-12, reproduced in the Appendix at pp. A-18 to A-19, emphasis added.)

This case, which is outside the jurisdiction of the district court, has already required USAA to expend hundreds of hours in retrieving 172 files from attorneys in practice all over the United States and in going through those files to produce, as the district court has ordered, various set and subsets of documents relating to jurisdiction. USAA is exposed further to the expenditure of time and expenditure of funds in preparation for a hearing requesting sanctions of $1.7 million. USAA's exposure to *sanctions* on the very issue that the district court wrongly decided, specifically the existence of or non-existence of diversity jurisdiction, makes this a compelling case requiring intervention by this Court by way of mandamus.

2. This Is a Case of Particular Public Importance

As pointed out by Judge Nelson in his opinion, USAA, as a large reciprocal insurance association, normally has 15,000 litigations pending annually. (A-12.) USAA is one of many reciprocal insurance companies which, by the nature of its business, is exposed to a large volume of annual litigation. *The district court's refusal to apply* the clear, unambiguous dictates of *Carden v. Arkoma*, strictly limiting the citizenship of artificial entities for diversity purposes to corporations only, *makes the issue of jurisdiction in this case one of widespread and critical public importance.* The district court's ruling incorrectly opens the door to litigation of thousands of cases by or against reciprocal insurance associations in federal court, thereby openly challenging this court's definitive mandate in Carden.

3. The District Court's Assertion of Diversity Jurisdiction in This Case Creates an Intolerable Conflict in the Law

The district court by ruling that USAA *can* be sued in federal court by a California resident, despite the fact that USAA has 186,000 California members, has ruled directly in conflict with *Baer v. United Services Automobile Association, supra,* and *Tuck v. United Services Automobile Association, supra.* Such a conflict would ordinarily be managed by a litigant, such as USAA, by getting out of federal court in the second and tenth circuits, and acceding to or asserting federal diversity jurisdiction in the Ninth Circuit as USAA has been told it must do in this case.

However, USAA is threatened with *sanctions* in this case for doing in other cases precisely what this present district court's order would *require,* – submitting to federal diversity jurisdiction. Moreover, the court has ordered discovery on, and will presumably consider, USAA's involvement in federal jurisdiction cases spanning an almost 20-year period in virtually every federal circuit in the nation.

The conflict in the law relating to diversity jurisdiction in this case therefore puts USAA in the intolerable position of being exposed to punishment for being inconsistent on an issue of law as to which the courts, by the decision in this case, have shown that they, too, can be inconsistent. Mandamus is particularly appropriate in this case to confine the district court to its lawful jurisdiction and to swiftly eliminate the conflict in the law that has been created by the district court's ruling.

4. USAA's Remedy by Appeal is Inadequate and Incomplete

Even though appeals may lie on both the issue of jurisdiction and on the potential imposition of sanctions, the possibility that appeals may be taken should not interfere with this Court's issuance of the extraordinary writ. (*See, In Re State of New York* (petition of Walsh), 256 U.S. 490, 497 (1921).)

As Judge Nelson pointed out, a potential appeal on the subject of jurisdiction would not result in a decision until approximately two years after the conclusion of this case. (A-11.) Considering the volume of litigation faced by USAA, it is a foregone conclusion that the district court's decision in this case will spawn similar disputes regarding federal diversity jurisdiction in not only cases presently pending, but those yet to be filed. Thus, it can be anticipated that a multiplicity of appeals on the issue of federal diversity jurisdiction will result from the district court's decision in this case. The considerable expenditure of USAA's resources in resolving the issues in this case by way of appeal, and by way of resolving similar issues in similar cases by way of appeals, *as well as the considerable expenditure of judicial resources* in resolving unnecessary appeals, will be completely obviated by this Court's issuance of mandamus directing the district court to dismiss this case which is so plainly in excess of its jurisdiction.

VI. CONCLUSION

Recognizing, as petitioner does, that mandamus is an extraordinary remedy, its exercise is compelled where, as here, an inferior court threatens to impose punitive sanctions against a litigant under the guise of an "inherent power" which (1) does not exist per se and (2) has no foundational subject matter jurisdiction in the first place.

Even if this case had been filed in federal court by an ordinary citizen, the utter disrespect for the stare decisis of *Baer, Tuck* and *Carden* would compel the need for mandamus relief.

But, here the action has been filed and is being vigorously prosecuted by a senior federal district judge who, perforce, must be held to a much higher level of knowledge and accountability with respect to the nuances of federal diversity jurisdiction.

In these times of intense public scrutiny of the conduct of all public officials, the circumstances of this case, we respectfully submit, call for swift and unambiguous relief from this Court so as to maintain the integrity of the entire federal judicial process – in fact and in perception.

The action of the district court in refusing to follow the clear direction of this Court in *Carden*, is a manifest abuse of judicial power in excess of the district court's jurisdiction for which the only adequate remedy is

mandamus, which petitioner respectfully requests be issued by this honorable Court.

Respectfully submitted,

DATED: April 22, 1992

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91-1707

No. _____

Supreme Court
FILED
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In The

Supreme Court of the United States

October Term, 1991

IN RE
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner

Petition For Writ Of Mandamus, Prohibition Or Other Appropriate Remedy To The United States District Court Central District of California

Petition For Writ Of Mandamus
APPENDIX, VOLUME I
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April 1992

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS, Plaintiffs, -vs- UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	No. CV-91-3615-WFN ORDER DENYING DEFENDANT'S MOTION TO DISMISS

Before the Court is defendant's Motion to Dismiss based on lack of subject matter jurisdiction heard by the Honorable Wm. Fremming Nielsen on November 8, 1991. Defendant was represented by Paul R. Fine; plaintiff was represented by William N. Shernoff and Frank N. Darras. At the conclusion of the hearing additional briefing was ordered. Having reviewed the record, having heard oral argument of counsel and being fully advised, this Court DENIES the Motion to Dismiss.

Plaintiffs initiated this action to recover sums allegedly due under a homeowner's insurance policy issued by defendant. Defendant brought this Motion to Dismiss alleging that as an unincorporated association with over 180,000 members who are domiciled in the State of California, there is no diversity for the purposes of federal subject matter jurisdiction.

Federal courts have subject matter jurisdiction over civil suits filed when the amount in controversy is over

$50,000 and there is complete diversity between opposing parties. 28 USC § 1332(a). When an entity is a named party, its domicile for diversity purposes depends upon its basic nature. If the entity is a corporation, it is considered to be domiciled in the state of its incorporation and the state where it has its principal place of business. 28 USC § 1332(c); *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). For non-corporate entities, the Supreme Court's *Carden* decision carefully set out "that diversity jurisdiction in a suit by or against [a non-corporate] entity depends on the citizenship of 'all the members.' " *Id.* at 195 citing *Chapman v. Barney*, 129 U.S. 677, 682 (1889).

The key issue is whether or not USAA is to be treated as a corporate or a non-corporate entity. It is important to note that in *Carden* the artificial entity was a partnership, and the court specifically distinguished the case of *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). *Russell* involved "the entity known as a *sociedad en comandita*, created under the civil law of Puerto Rico, [and held it] could be treated as a citizen of Puerto Rico for the purposes of determining federal court jurisdiction." *Carden* at 189-90. The *Carden* court went on to state "[t]here could be no doubt, after *Bouligny*, that at least common-law entities (and likely all entities beyond the Puerto Rico *sociedad en comandita*) would be treated for the purposes of the diversity statute to what *Russell* called '[t]he tradition of the common law,' which is 'to treat as legal persons only incorporated groups and to assimilate all others to partnership.' "[1] *Id.* at 190. Thus *Carden*, a 5-4 decision, has

---

[1] *Bouligny* held that an unincorporated labor union is not a citizen for purposes of diversity. *Steelworkers v. R.H. Bouligny,*

(Continued on following page)

strong language regarding non-corporate entities being unable to assert a corporate type of citizenship yet it is noteworthy that the Supreme Court did not draw that black and white line of jurisdictional status simply based upon the label corporate or non-corporate entity. As the Supreme Court did not draw that line, neither will this Court. The question then becomes whether USAA has sufficient corporate traits to be within the *sociedad en comandita's* "corporate" boundaries.

Carden also notes that *Bouligny* "considered and rejected applying *Russell* beyond its facts." *Carden*, 494 U.S. at 190 n. 2. In *Russell* the court found that:

> The tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships. . . . The tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise. Therefore to call the *sociedad en comandita* a limited partnership in the common law sense . . . is to invoke a false analogy. In the law of its creation, the *sociedad en comandita* is consistently regarded as a juridical person. It may contract, own property and transact business, sue and be sued in its own name and right. . . . Its members are not thought to have a sufficient personal interest in

---

(Continued from previous page)

Inc., 382 U.S. 145 (1965). *Bouligny* distinguished *Russell* by pointing out that " 'the *sociedad en comandita* is consistently regarded as a juridical person.' " *Id.* at 151 quoting *Russell*, 288 U.S. at 480-81. There can be no doubt that USAA is a juridical person, as evidenced by the number of Texas statutes regulating its operations and its treatment under Texas law. *See Kiepfer v. Beller*, 944 F.2d 1213 (5th Cir. 1991).

> a suit brought against the entity to entitle them to intervene as parties defendant. . . . It is created by articles of association filed as public records. . . . Where the articles so provide, the *sociedad* endures for a period prescribed by them regardless of the death or withdrawal of individual members. . . . Powers of management may be vested in managers designated by the articles from among the members whose participation is unlimited and they alone may perform acts legally binding on the *sociedad*."

Russell, 288 U.S. at 480-81. The opinion goes on to list many other similarities between the *sociedad* and corporations. In the instant case, USAA easily fits within the facts of *Russell*. USAA is a statutory entity governed by very specific Texas insurance laws. *See* Chapter 19 of the Texas Insurance Code. Additionally, federal laws treat USAA in a corporate manner. *See Republic Underwriters v. Ford*, 100 F.2d 511, 514 (5th Cir. 1938) (reciprocal exchange treated as an insurance corporation under the bankruptcy law); *Kurzner v. United States*, 413 F.2d 97, 101-02 (5th Cir. 1969) (IRS Code definition of corporation includes associations and insurance companies but distinguishes partnerships and trusts from corporations). Plaintiffs have also cited *Kiepfer v. Beller*, 944 F.2d 1213 (5th Cir. 1991) for the proposition that a reciprocal insurance exchange is treated as a corporation under Texas law. In *Kiepfer*, the Fifth Circuit needed to decide whether a director of a reciprocal insurance exchange was an agent of that exchange. The court resolved the issue by resorting to the provisions of the Texas Business Corporation Act, noting that "[w]hen the Insurance Code fails to address some question of corporate law, it is supplemented by the

provisions of the Texas Business Corporation Act to the extent that the Business Corporation Act is consistent with the Insurance Code. *See Texas Business Corp. Act. art. 9.14* (West Supp. 1991)." *Id.* at 1218 n. 1. Additional persuasive arguments of USAA's corporate-like personality can be found in USAA's Brief in Opposition to Motion to Remand filed in *Pridgen v. United Services Automobile Association*, No. 84-247-ALB-AMEF (U.S.D.C. M.D. GA. Nov. 1984) attached as Exhibit A to Plaintiff's Supplemental Briefing in Opposition to Motion to Dismiss filed December 9, 1991.

This Court is not unmindful of the decisions outside of the Ninth Circuit declining to treat USAA as a juridical person for purposes of diversity. Most notable of these cases are *Baer v. United Services Automobile Association*, 503 F.2d 393, 395 (2nd Cir. 1974) and *Tuck v. United Services Automobile Association*, 859 F.2d 842 (10th Cir. 1988), *cert den.* 489 U.S. 1080 (1989). Both of these cases were pre-*Carden*, relied on *Bouligny* and did not discuss *Russell*. Though *Bouligny* appeared to undercut *Russell*, *Carden* makes it clear that *Russell* still has precedential value and must be considered in any analysis of an association as a juridical person.

Therefore under the civil laws of Texas, USAA is treated as a corporation as much if not more so than the *sociedad en comandita* in *Russell* and is entitled to be treated as a corporation for diversity purposes in federal court.

Also pending is plaintiff's Motion for Sanctions which will continue under advisement. Accordingly,

IT IS ORDERED that defendant's Motion to Dismiss for lack of subject matter jurisdiction be and the same is hereby DENIED.

IT IS SO ORDERED. The Clerk is hereby DIRECTED to enter this Order and forward copies to counsel.

DATED this ___ day of February, 1992.

WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED SERVICES AUTOMOBILE ASSOCIATION Petitioner, vs. UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, Respondent, and LAUGHLIN E. WATERS, et al., Real Parties in Interest.	No. 92-70122 DC# CV-91-3615-WFN Central California ORDER (Filed Mar. 13, 1992)

Before: FARRIS, O'SCANNLAIN and T. G. NELSON, Circuit Judges

The petition for writ of mandamus is denied. *See Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977). The motion for stay pending consideration of the petition is denied as moot.

T. G. NELSON, Circuit Judge, dissenting:

A separate dissent will be entered at a later date.

(Filed Mar. 26, 1992)

T. G. NELSON, Circuit Judge, Dissenting:

I respectfully dissent from the Order Denying the Petition for Writ of Mandamus.

Laughlin E. Waters, and his wife Voula, (collectively "Waters") the real parties in interest, are insured under a

policy of insurance issued by USAA, covering their residence from physical damage due to certain causes. Their house was damaged by fire and USAA undertook to adjust the loss. Disagreements arose and the result was an action filed by Waters in the Federal District Court in the Central District of California contending that USAA had breached its duty of good faith and fair dealing by failing to offer adequate reimbursement for the damages sustained by their home and in unreasonably delaying payments to them.

USAA is a "reciprocal or interinsurance exchange," existing under the laws of the State of Texas. USAA filed a motion to dismiss the complaint on the ground that the district court lacked subject matter jurisdiction because an unincorporated association is a citizen of each state in which it has members. USAA has 186,000 members in California, which would destroy diversity between itself and Waters if USAA is correct in its contentions.

Waters opposed USAA's motion and also requested that the district court award sanctions in the amount of $1.72 million. The basis of Waters' sanction request is that USAA has been inconsistent in its approach to federal court subject matter jurisdiction in many other cases across the United States. They argue that USAA's abuse of the system makes it appropriate for the district court to assess sanctions of $10,000 in each of the 172 cases in which, they contend, USAA had taken inconsistent positions about subject matter jurisdiction. The district court denied USAA's motion to dismiss and took under advisement the request for sanctions. There are currently pending a hearing date on the motion for sanctions of May 14, 1992, and a trial date for the basic case of June 22, 1992.

USAA requested the district court to certify its decision on the motion to dismiss for interlocutory appeal under 28 U.S.C. § 1292, which the district court refused to do. USAA here seeks a writ of mandamus directing the district court to dismiss the Waters' case for lack of subject matter jurisdiction.

As we approach the question of issuance of a writ of mandamus, we have some guidance from the Supreme Court and earlier decisions of this court. This court in *Bauman v. United States District Court*, 557 F.2d 650 (1977), the only authority cited by the majority, established the analytical basis for this circuit in approaching writs of mandamus directed to the district courts. The court quoted from *Kerr v. United States District Court*, 426 U.S. 394 (1976), as follows:

> The remedy of mandamus is a drastic one, to be involved only in extraordinary situations. As we have observed, the writ "has traditionally been used in the federal courts only 'to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " And, while we have not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of "jurisdiction," the fact still remains that "only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy."

Bauman, 557 F.2d at 654 (quoting *Kerr*, 426 U.S. at 402 (citations omitted)).

The *Bauman* court went on to say other cases and authorities bristle with language likewise suggesting that

mandamus will issue only in "drastic," "exceptional," and "extraordinary" circumstances. The *Bauman* court distilled five specific guidelines from Supreme Court and Ninth Circuit jurisprudence to aid in analysis:

1. The party seeking the writ has no other adequate means, such as a direct appeal, to obtain the relief he or she desires;

2. The petitioner will be damaged or prejudiced in a way not correctable on appeal;

3. The district court's order is clearly erroneous as a matter of law;

4. The district court's order is an oft repeated error, or manifests a persistent disregard of the federal rules; and

5. The district court's order raises new and important problems or issues of law of first impression.

Id. at 654-55.

The court then went on to note that its method of analysis does not always compel a particular result:

> Although these guidelines are helpful, they, of course, do not always result in bright-line distinctions. First, the guidelines often raise questions of degree: How clear is it that the lower court's order is wrong as a matter of law? How severe will damage to the petitioner be if extraordinary relief is withheld? Second, rarely, if ever, will a case arise where all the guidelines point in the same direction or even where each guideline is relevant or applicable.

Id. at 655.

I will therefore apply the *Bauman* guidelines in my analysis.

1. *No other adequate means.* USAA will no doubt be able to appeal an adverse judgment following the four-day trial scheduled for June. Presumably, but not certainly, it will also be able to appeal any sanctions levied by the district court at the same time or earlier. In due course, some 24 months later, it could expect to receive a decision from this court on the jurisdictional issue. If this is the usual course of a direct appeal, and if a direct appeal is an adequate remedy, then, in this case, USAA is no better or worse off then other parties having to appeal wrong decisions of district courts.

It is by no means a universal rule that the existence of a remedy by appeal operates to automatically limit the use of an extraordinary writ. In *In re State of New York (Petition of Walsh)*, 256 U.S. 490 (1921), the Supreme Court issued an extraordinary writ to prevent the district court from entertaining an action that was barred by the Eleventh Amendment. The Court there emphasized the lack of authority in the district court and said: "The fact that the objection to the jurisdiction of the court below might be raised by an appeal from the final decree is not in all cases a valid objection to the issuance of a prohibition at the outset. . . . " *Id.* at 497.

2. *Damage or prejudice not entirely correctable on appeal.* This guideline blurs somewhat into Guideline No. 1, on the adequacy of the appeal as a remedy. (*See Bauman* at 654.) In the situation where the petitioner has pending only the one case which is before the court, then the analysis under *Bauman* might lead to a decision to deny

the writ. However, USAA points out that it is in a somewhat different position. It has 15,000 cases pending nationwide, although undoubtedly only some of those involve cases directly against USAA as opposed to cases against its insureds. Twenty-two of those 172 cases it advances as showing USAA's perfidy were in eight different district courts in the Ninth Circuit, one of which is still pending, in the District of Nevada. With this history of litigation here, USAA has more than an ordinary litigant's interest in the rule pertaining in this circuit.

In addition, USAA is exposed to both the necessity to litigate, and the potential for imposition of sanctions by the district court here for doing no more than legitimately raising an issue relating to the district court's jurisdiction. USAA will be faced with justifying or explaining its position in those 172 cases, dating back to *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974). In addition to the costs associated with the trial itself, the sanctions effort exposes USAA to further fruitless effort since the court has no subject matter jurisdiction. This is an unusual situation for a litigant to find itself in and is an element of prejudice which does not arise in the routine or garden variety struggle over subject matter jurisdiction. For this reason, I believe that the second guideline indicates that USAA is entitled to some relief from this court.

3. *The district court decision is clearly erroneous.* In my view, the district court has either misread or refused to apply controlling Supreme Court and Ninth Circuit precedent on the issue of diversity jurisdiction over unincorporated associations. We need look no further than the recent Supreme Court case of *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015, 108 L.Ed.2d 157 (1990), to

learn all we need to know about the current state of the law on this issue. *Carden* stands for the proposition that the status of an entity under state law controls, with noncorporate entities having the residence of each of its members. That case involved a limited partnership organized under the law of Arizona which filed a diversity action in federal court in Louisiana. The defendants contested jurisdiction on the ground that one of the partnership's limited partners was a citizen of Louisiana. After trial, in which the partnership prevailed, the defendants succeeded in attracting the attention of the Supreme Court. The Supreme Court reviewed the state of its jurisprudence concerning the treatment of noncorporate business organizations. The Court there said: "While the rule regarding the treatment of corporations as 'citizens' has become firmly established, we have (with an exception to be discussed presently) just as firmly resisted extending that treatment to other entities."

The one exception the Supreme Court pointed to was *People of Puerto Rico v. Russell & Co., Sucesores S.En.C.*, 288 U.S. 476 (1933), which held that an entity created under the civil law of Puerto Rico could be treated as a citizen of Puerto Rico for diversity purposes, even though it was not a corporation. In *Carden* Arkoma argued that the existence of the *Russell* case and the language used therein,

> reflect the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship.

The Supreme Court rejected this contention by Arkoma, saying:

> The problem with this argument lies not in its logic, but in the fact that the approach it espouses was proposed and specifically rejected in [*United Steelworkers of America*, AFL-CIO v. R.H. Bouligny, Inc. 382 U.S. 145 (1965)] . . . There could be no doubt, after *Bouligny*, that at least common-law entitles (and likely all entities beyond the Puerto Rican sociedad en commandite) would be treated for purposes of the diversity statute pursuant to what Russell called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships."

Id. at 1018.

Thus, after *Carden*, the only inquiry to be made is whether or not the entity is or is not a corporation.

In the face of this authority, the district court reviewed the status of USAA pursuant to the *Russell* exception, stating the question before it was whether "USAA has sufficient corporate traits to be within the *societe en commandite's* corporate boundaries." After noting that USAA is a statutory entity governed by very specific Texas insurance laws, and that federal laws treat USAA in a corporate manner for a variety of purposes, the court considered USAA to have sufficient corporate traits to come within the *Russell* analysis. Even after looking at *Carden* and *Bouligny*, the court nevertheless stated that "*Carden* makes it clear that *Russell* still has precedential value," and that *Russell*'s functional approach in determining an entity's jurisdictional status

"must be considered in any analysis of an association as a juridical person." The district court followed this analysis in the face of the Supreme Court's specific rejection of this very argument in *Arkoma*, as quoted above.

The district court also noted the existence of a Second Circuit case (*Baer*) and a Tenth Circuit case (*Tuck*) both specifically involving USAA and both specifically holding that USAA was to be considered a citizen of each and every state in which it has members.[1] However, the district court tried to distinguish these cases on the grounds that they were pre-*Carden*, relied on *Bouligny*, and did not discuss *Russell*.

This dismissal of *Carden* and *Bouligny*, not to mention *Baer* and *Tuck*, is simply insupportable. The question before the district court was whether USAA was a corporation under the laws of Texas, not whether it has sufficient corporate-like traits to be treated as a corporation.

Waters assert here a basis of decision which the district court did not rely on, although Waters urged it there also. Waters contend that Texas has amended its statutes to turn unincorporated associations into corporations. This contention has no merit. Reciprocal and interinsurance exchanges are organized under Chapter 19 of the Texas Insurance Code. Article 19.12 exempts reciprocal or interinsurance exchanges from all insurance laws of the State of Texas, except those specifically mentioned in that

---

[1] *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974); *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989). The *Baer* case specifically analyzed the status of USAA under Texas law, and concluded that it was not a corporation. The *Tuck* case agreed.

section or in other statutes specifically mentioning exchanges.

The 1987 Act relied on by Waters (Ch. 424, Acts 1987, 70th Leg.) defines as a corporation, for the purpose of the Miscellaneous Insurance Laws, any corporation organized under specified acts, including the Insurance Code. The 1987 Act was passed to permit the shareholders of corporations as defined therein, which included some unincorporated associations, to amend the articles to exclude liability of its directors to the shareholders or members for acts or omissions as directors, with some exceptions.

The *Baer* court examined the Texas insurance statutes and concluded that USAA, as an exchange, was not a corporation. Examination of Chapter 19 of the Texas Insurance Code demonstrates that exchanges are still not corporations at all, so they can not be corporations organized under the Insurance Code, within the meaning of Ch. 424.

If there was any doubt about the inapplicability of the 1987 Act, it was laid to rest by another act passed by the Texas legislature in 1987. Chapter 639, effective on the same date as Chapter 424, is codified as Article 19.13 of the Insurance Code, and provides:

> The provisions of the Texas Business Corporations Act relating to the indemnification of officers and directors apply to and govern reciprocal or interinsurance exchanges organized under this Chapter [which relates to exchanges].

Article 1302-1.03A of the Miscellaneous Corporations Laws Act provides:

> All corporations shall, to the extent not inconsistent with any special statute pertaining to a particular corporation, be governed:
>
> (1) by the Texas Business Corporations Act, as amended, if organized for profit, and
>
> (2) by the Texas Non-Profit Corporation Act, as amended, if organized not for profit.

If exchanges were indeed corporations, by virtue of Section 424, then Section 639 was not needed, as exchanges would have already been governed by the Texas Business Corporations Act, pursuant to the operation of Article 1302-1.03a.

A reciprocal or interinsurance exchange is not a corporation under Texas law. The statutes make that abundantly clear, and case law from the courts of Texas also supports this conclusion. *See, e.g., Highway Ins. Underwriters v. Reed*, 221 S.W.2d 925 (Tex. Civ. App. 1949). Chapter 424 did not change the status of exchanges, and they are still not corporations.

4. *Oft repeated error or persistent disregard of federal rules.* This fourth factor does not, by its terms, apply here.

5. *The district court's order raises new and important problems or issues of law of first impression.* At first glance, the decision of the court below does not raise any issues of law of first impression. The *Carden* rule seems clear enough.

The district court has decided, though, that a functional analysis of corporate-like traits is still possible after

Carden. This limited view is contrary to that of every federal court which has considered the effect of *Carden*.

A decision by this court now will impact the case now pending in the Central District, as well as the one pending in Nevada. USAA is not the only reciprocal or interinsurance exchange doing business in the Ninth Circuit, so the potential for other litigants plus USAA to face diversity questions relating to these entities is very real. In this sense, the district court raises important new issues for litigants and the federal courts.

If this were an ordinary insurance bad faith case, a writ of mandamus would perhaps not be appropriate. Here, however, we have an insurer with an inventory of 15,000 cases nationwide, and a history of being heavily involved in first-party disputes with its insureds. This case load, and exposure to conflicting results in other cases might not, by itself, tip the balance sufficiently to trigger a writ. But Waters have shown themselves to be determined opponents. They appear intent on not only vindicating their own wrongs, but in the process, cleaning up USAA's act by seeking $1.72 million in sanctions for its conduct in dozens of other cases unrelated to theirs.

USAA may need a cathartic experience such as Waters intend to give it. The propriety of any such sanctions is not before us. Since the district court lacks jurisdiction, and USAA's motion did no more than point that out, the propriety of sanctions is not for that court, either. What USAA does not need is to undergo the ordeal it faces in a court without subject matter jurisdiction. The district court does not need to expend its efforts and the

parties' time and money in pursuing a case which is so clearly outside its authority.

If the lack of jurisdiction in the district court were not so apparent, the other problems faced by USAA would not be sufficient to justify mandamus. When all these factors are weighed, we have "exceptional circumstances amounting to a judicial usurpation of power." *Kerr*, 426 U.S. at 402.

In deciding to issue a writ rather than let the case proceed in the ordinary manner, the Supreme Court said in *In re State of New York (Petition of Walsh)*:

> The want of authority in the District Court to entertain these proceedings . . . is so clear, and the fact that the proceedings are in essence suits against the State without its consent is so evident, that instead of permitting them to run their slow course to final decree, with inevitably futile results, the writ of prohibition should issue as prayed.

Id., 256 U.S. 490, 502 (1921).

For the reasons stated above, I believe that USAA has stated not only a justiciable claim for extraordinary relief by mandamus, it has stated a compelling case for our doing so. The inevitably futile result which will follow months from now dictates that we rule on the jurisdictional issue at this point, rather than many months and much labor from now. I therefore dissent from the denial of the Petition for Writ of Mandamus.

EXHIBIT A

No. 90-5009
No. 90-5022

IN THE UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

LEROY TUCK, Administrator of the
Estate of JOHNNY L. TUCK, Deceased;
LEROY TUCK, an Individual, and
DOROTHY TUCK, an Individual,
Plaintiffs/Appellees,

vs.

ROBERT F. McDERMOTT, as the Class Representative
of the diverse Subscribers of
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Defendant/Appellant,

and

UNITED SERVICES AUTOMOBILE ASSOCIATION,
An Unincorporated Association,

Defendant/Appellant.

REPORT ON MEASURES UNDERTAKEN
TO INSURE THAT UNITED SERVICES AUTOMOBILE
ASSOCIATION, AS AN ENTITY, WILL NOT BE
A PARTY IN FEDERAL COURT ACTIONS BASED ON
DIVERSITY OF CITIZENSHIP

On Appeal from the United States District Court
for the Northern District of Oklahoma
Case No. 83-C-175 C
The Honorable H. Dale Cook, District Judge

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INTRODUCTION

On November 16, 1990, the parties in these cases reached a complete settlement of all pending matters. United Services Automobile Association ("USAA") agreed to pay the plaintiff-appellees the amount of the judgment in this case, including accrued interest – *i.e.*, $1,396,063.85 (plus $448.29 per day additional between November 20, 1990, and the date of payment). The parties agreed to file a joint motion seeking dismissal of all pending matters, and USAA's payment to plaintiff-appellees was to take place promptly upon this Court's granting of the Joint Motion. That Joint Motion was filed with this Court on November 23, 1990.

In the Joint Motion, the parties noted that, while not required by the settlement agreement, USAA wished to address the issues raised in plaintiff-appellees' October 25, 1990, Motion to Impose Sanctions Against USAA in No. 90-5009. In that motion plaintiff asserted, *inter alia*, that after this Court's decision in *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), *cert. denied*, 109 S. Ct. 1534 (1989), holding that USAA could not appear as a party in diversity cases, USAA continued to appear in federal court in 22 cases. USAA undertook to file the report with the Court by December 10, 1990.

This report advises the Court of the steps that USAA has taken, and is continuing to take, to insure that USAA, as an entity, will not be a party to actions in federal courts based on diversity of citizenship.

Part I describes the efforts taken by USAA at about the time of this Court's original decision in *Tuck* to notify its personnel that USAA, as an entity, is not subject to

federal jurisdiction based on diversity. Part II discusses the 22 post-*Tuck* cases cited by plaintiff-appellees as involving USAA as a party in federal court diversity litigation. Finally, Part III examines recent efforts by USAA to prevent the problem from arising again in the future.

I. STEPS TAKEN AT THE TIME OF *TUCK* TO AVOID USAA'S APPEARANCE AS AN ENTITY IN FEDERAL COURT BASED ON DIVERSITY OF CITIZENSHIP

On May 2, 1988, after the Tenth Circuit had been advised of the diversity problem in *Tuck*, USAA advised its personnel to avoid diversity actions in federal court. Specifically, USAA sent a bulletin to all regional claims officials (*i.e.*, senior claims attorneys, supervisors of litigation, regional claims management, and casualty file handlers) in the various USAA offices[1] advising them of the diversity issue. Citing the Second Circuit's decision in *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974), the bulletin explained that USAA, as an unincorporated association, was a citizen for diversity purposes of every state in

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[1] Although USAA's headquarters and two regional offices are in San Antonio, Texas, most of its litigation is handled out of its offices in Sacramento, California; Colorado Springs, Colorado; Tampa, Florida; Norfolk, Virginia; Reston, Virginia; and Seattle, Washington. Each office has various claims management officials, including an assistant vice president. There is also a supervising attorney in each office. The supervising attorney is assisted by litigation supervisors (and, below them, by numerous file handlers). These individuals supervise lawsuits handled by both USAA staff counsel and outside counsel.

which it has members. The bulletin then instructed as follows:

> [I]n any federal action in which USAA is named as a defendant and the jurisdictional basis of the action is diversity, claims personnel should take appropriate action to seek dismissal based on the lack of diversity. This ruling applies only to USAA and not to any other company in the USAA structure. . . . [2]

On October 14, 1988, this Court held in *Tuck* that USAA, as an entity, could not appear as a party in federal court based on diversity of citizenship. The Court reasoned that because USAA is a reciprocal exchange, it must be treated as a citizen of every state in which it has members.[3] The Court noted that because USAA has "asked us to dismiss this action for lack of subject matter jurisdiction, we expect it to make similar motions in all pending diversity litigation." 859 F.2d at 845 n.3.

On December 12, 1988, USAA sent a second memorandum to all senior claims attorneys, supervisors of litigation, and San Antonio claims counsel staff. That memorandum stated that in addition to the Second Circuit's decision in *Baer*, the principle that USAA, as an

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[2] There are several entities in the USAA structure, such as USAA Casualty Insurance Company, which are Texas corporations rather than unincorporated associations, and which therefore are not subject to the reasoning in *Baer* and *Tuck*.

[3] The correctness of this Court's reasoning was affirmed on February 27, 1990, by the Supreme Court. *Carden v. Arkoma Associates*, 110 S. Ct. 1015 (1990) (holding that for purposes of diversity, a limited partnership is a citizen of every state in which a general or limited partner resides).

entity, cannot sue in federal court based on diversity of citizenship was established by this Court's *Tuck* decision. The memorandum indicated that each recipient "need[s] to review the *Tuck* decision. The court is very strong on its position regarding USAA litigating in Federal Court. The message is clear, stay out of Federal Court." The memorandum added that "all future cases will be handled in accordance with the *Baer* decision and the *Tuck* decision," and it instructed all recipients to "[m]ake sure that the file handlers in your area are aware of this law and the policy regarding our use of the Federal Court system."

On May 10, 1989, USAA conducted a legal conference for senior claims attorneys, supervisors of litigation, and regional claims management personnel. One of the topics was "USAA as a defendant in federal court." The discussion centered on *Baer* and *Tuck* and the need to recognize that USAA, as an entity, cannot sue or be sued in federal court based on diversity of citizenship.

II. POST-*TUCK* FEDERAL DIVERSITY CASES INVOLVING USAA

Notwithstanding USAA's efforts to advise the USAA staff about *Baer* and *Tuck* and the need to avoid diversity litigation when USAA as an entity is involved, a small number of the approximately 15,500 cases in USAA's litigation docket were cases brought by or against USAA based on diversity of citizenship that were either filed after *Tuck* or, although initially filed prior to *Tuck*, remained open subsequent to that decision. This apparently occurred in large part because the previous notices

to USAA's own staff were not transmitted directly to USAA's local outside counsel and in part because some USAA staff members did not implement USAA's policy as carefully as they should have.

In their Motion to Impose Sanctions Against USAA, appellees cite 22 such cases. Some of those 22 cases reflect no departure from USAA's policy or this Court's admonition in *Tuck*. Thus, one of the 22 cases, *Porter v. USAA, d/b/a USAA Casualty Insurance Company*, No. CV-88-PT-0286-S (N.D. Ala. dismissed Dec. 14, 1988) (Appellees' Case No. 20), involved a policy written by one of USAA's corporate subsidiaries, USAA Casualty Insurance Company, and thus raised no issue of improper diversity. *See* note 2, *supra*. Moreover, in seven of the 22 cases, USAA, after being named as a party in federal court based on its alleged status as a Texas citizen, promptly called the jurisdictional issue to the court's attention.[4]

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[4] *Pacific Int'l Servs. Corp. v. Kaji*, No. 89-00074-ACK (D. Hawaii) (Case No. 5) (complaint filed 1/31/89; USAA's motion to intervene, which noted jurisdictional issue, filed 3/24/89 and granted 4/25/89; USAA's answer, which asserted lack of diversity and subject matter jurisdiction, filed 6/6/89; stipulated dismissal filed 11/21/89); *Herrmann v. USAA*, No. SA-87-CA-0316 (W.D. Tex) (Case No. 13) (complaint filed 3/29/88; USAA's answer, which asserted lack of diversity and subject matter jurisdiction, filed 4/7/88; USAA's motion to dismiss for want of subject matter jurisdiction filed 3/22/89 and granted 4/5/89); *USAA v. Jelks*, No. 88-58-CIV-2 (E.D.N.C.) (Case No. 14) (USAA's state court complaint filed 10/12/88; defendant's removal petition filed 10/24/88; USAA's reply to counterclaim, which noted lack of diversity and subject matter jurisdiction, filed 11/28/88; USAA's motion to remand filed 1/19/89 and

(Continued on following page)

Of the remaining cases cited by appellees, only two are still pending in federal court: *USAA v. Arey*, No. 89-0139-A (W.D. Va.) (Appellees' Case No. 1), and *Insurance Co. of the State of Pennsylvania v. Pacific Engineering & Prod. Co. of Nevada, Inc.*, No. CV-S-89-380-PMP (D. Nev.) (Appellees' Case No. 2). In both of those cases, USAA has filed motions to dismiss on the ground that the court lacks subject-matter jurisdiction over USAA.

III. OTHER RECENT EFFORTS TO CORRECT THE DIVERSITY PROBLEM

In the past several months, USAA has undertaken numerous other steps to correct the diversity problem. These include the following:

First, on September 6, 1990, USAA sent a memorandum addressing the issue to all senior claims attorneys,

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granted 3/16/89); *Dennis v. USAA*, No. CIV-88-2045-A (W.D. Okla.) (Case No. 16) (complaint filed 11/17/88; USAA's motion to dismiss, which asserted a lack of diversity and subject matter jurisdiction, filed 1/3/89; joint dismissal filed 1/20/89); *Lovelace v. USAA*, No. CIV-88-1236-P (W.D. Okla.) (Case No. 17) (complaint filed 7/22/88; USAA's suggestion of lack of subject matter jurisdiction and motion to dismiss filed 8/18/88 and granted 11/23/88); *Hartford Casualty Ins. Co. v. Kennedy*, No. 88-CIV-250 (N.D. Ga.) (Case No. 18) (complaint filed 2/5/88; USAA's answer, which asserted a lack of diversity and subject matter jurisdiction, filed 6/3/88; consent judgment entered 1/24/89); *O'Brien v. USAA Properties II, Inc.*, No. 88-CIV-1124 (N.D. Ga.) (Case No. 22) (complaint filed 5/23/88; USAA substituted as proper party defendant 7/12/88; USAA's motion to dismiss for lack of subject matter jurisdiction filed 8/12/88 and granted 10/19/88).

claims attorneys, supervisors of litigation, regional claims management, and casualty file handlers. The memorandum provided a detailed discussion of this Court's *Tuck* decision and noted that "[t]he court was extremely agitated at USAA's delay in pointing out the jurisdictional problem and directed the District Court to consider sanctions against USAA." The memorandum concluded:

> All claim handlers who are involved in litigation are reminded that USAA should appear neither as a plaintiff nor defendant in federal court when diversity is the jurisdictional basis.
>
> USAA CIC and USAA GIC are not reciprocals and federal court actions based on diversity are permissible when one of these entities is a named party.

Second, on November 8, 1990, USAA's Senior Vice President and General Counsel sent a memorandum to all of USAA's approximately 3,200 outside counsel. The letter advised these attorneys that:

> *Under no circumstances should any case involving USAA be commenced in defended in or removed to federal court on the basis of diversity jurisdiction.* (Emphasis in original).

Counsel were asked to identify any additional pending federal court case for which they are responsible involving USAA as a party based on diversity of citizenship. On November 15, 1990, USAA sent a similar memorandum to all litigation supervisors, claims attorneys, and senior claims attorneys containing the same italicized warning and requesting immediate identification of any cases improperly pending in federal court. As a result of those memoranda USAA has identified three additional cases

in federal court in which USAA as an entity is the named party.[5] Dismissals have been sought in two of these cases; in the third, USAA has yet to be served, but plans to seek dismissal as soon as service is effected. If other cases are reported, they will also be dismissed or other appropriate action will be taken.

Fourth, on November 14, 1990, USAA's Vice President and Claims Counsel sent to all of USAA's outside counsel and USAA staff counsel an attachment to be included in the USAA Litigation Manual (the "Manual").[6] The attachment explains the diversity problem with respect to USAA and states the following:

> If an action is filed in federal court based on diversity, it is USAA's policy to actively seek dismissal. Likewise we should never file any suits in federal court based on diversity.

The attachment will be made a permanent part of the Manual when it is revised within 90 days.

Fifth, on November 20, 1990, USAA added a notice to its "transmittal memorandum," a document that USAA requires to accompany every new case file sent to local

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[5] These cases are in the Western District of Kentucky, the Southern District of Florida, and the Western District of Louisiana

[6] The Manual contains procedures and policies for all attorneys representing USAA in claims matters. It is distributed to all USAA in-house counsel, staff attorneys, and file handlers as well as all outside counsel representing USAA.

counsel, which states in block letters: "USAA, A RECIPROCAL INTERINSURANCE EXCHANGE, AS AN ENTITY, IS NOT SUBJECT TO FEDERAL DIVERSITY JURISDICTION IN ANY OF THE FEDERAL DISTRICTS. SEE USAA LITIGATION MANUAL FOR FURTHER DETAILS."

Finally, USAA is currently updating its computer system for tracking cases in federal court. Information regarding USAA's court docket has been computerized only for the past two years. Even during that time, the information has not been complete because claims personnel have sometimes failed to enter pertinent information, such as the court in which a particular case is pending. USAA is now exploring the purchase of a major computer software system which, when fully operable, will better enable the company to track all pending court cases. By reviewing this information on a regular basis, USAA should be able to identify any case which has been improperly filed against USAA as a defendant in a diversity action. Corrective action can then be taken immediately.

USAA regrets that even after *Tuck,* diversity cases involving USAA as an entity were brought or remained in federal court. However, USAA believes that the above

steps, taken together, should effectively eliminate this problem in the future.

Respectfully submitted,

/s/ Timothy B. Dyk
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Counsel for Defendant-Appellant United Services Automobile Association

Dated: December 10, 1990

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is 1801 Century Park East, Ninth Floor, Los Angeles, California 90067.

On October 28, 1991, I served the foregoing document described as **DECLARATION OF TIMOTHY B. DYK IN SUPPORT OF REPLY MEMORANDUM TO OPPOSITION TO MOTION TO DISMISS AND REQUEST FOR SANCTIONS** on the interested parties in

this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

William M. Shernoff
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

I deposited such envelope(s) in the mail to Los Angeles, California. The envelope was mailed with postage thereon fully prepaid.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on October 28, 1991, at Los Angeles, California.

/s/ Shirley Kadomoto
Shirley Kadomoto

WILLIAM M. SHERNOFF, #38856
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 JSL(GHKY) COMPLAINT AND DEMAND FOR JURY TRIAL 1. Breach of Duty of Good Faith and Fair Dealing (Filed Jul. 5, 1991)

Plaintiffs allege as follows:

GENERAL ALLEGATIONS

1. Plaintiffs, LAUGHLIN E. WATERS and VOULA D. WATERS ("WATERS"), are, and at all times herein mentioned were, residents and citizens of the State of California, City of Los Angeles.

2. Defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), is, and at all times herein mentioned was a domestic reciprocal insurance company with its principal place of business in the State of Texas.

3. This court has original jurisdiction under 28 USC Section 1332 in that this is a civil action between citizens of different states in which the matter in controversy exceeds, exclusive of costs and interest, fifty thousand dollars ($50,000).

4. On or about August 18, 1989 plaintiffs' property at 112 North June Street, Los Angeles, California ("residence") was appraised by Chubb Group of Insurance Companies. At that time, the estimate of the current cost of reconstruction was $1,607,000.

5. On or about July, 15, 1990 USAA issued Homeowners Policy number 165 45 98 92A ("the Policy") to plaintiffs to cover the residence from July 15, 1990 to July 15, 1991. A copy of the Policy is attached hereto as Exhibit "A". The Policy provided, among other things, that if plaintiffs' residence was damaged by fire, then USAA would pay benefits to plaintiffs for the damages they sustained as a result of the fire, including damages to their dwelling, personal property, and damages for loss of use incurred as a result of the fire. The Policy was entered into by plaintiffs within the jurisdiction of the above-entitled court and required payment of benefits to plaintiffs within the jurisdiction of the above-entitled court for a total amount to be shown at the time of trial.

6. The Policy was purchased by plaintiffs in the reasonable expectation that it would provide coverage for claims relating to plaintiffs' home, including claims due

to fire loss and that defendant would deal with plaintiffs fairly, equitably, in good faith and in full conformity with the expressed and implied terms of the Policy. This expectation was brought about and intended by defendant as a result of the contractual language in the Policy and by the express representations of the respective employees, agents and representatives of defendant.

7. The Policy provided the following limits of liability: Dwelling – $1,615,000; Private Structures – $161,500; Personal Property – $1,615,000; Loss of Use – $323,000.

8. Plaintiffs have paid all premiums due under the Policy to USAA at all relevant times herein, have performed all obligations under the Policy on plaintiffs' part to be performed and have otherwise acted at all times in full conformity with their obligations under the Policy.

9. On or about December 17, 1990 plaintiffs' residence was extensively damaged due to fire. As coverage provided through the Policy extended through July 15, 1991, the Policy was in full force and effect at the time the fire occurred.

10. Plaintiffs timely notified USAA of the loss suffered as a result of the fire.

11. On or about December 17, 1990 USAA informed plaintiffs that their claim had been assigned to Kevin Bushaw ("Bushaw"), General Adjuster, and stated that plaintiffs could use the contractor of their choice. Plaintiffs chose TMLC Construction Services Co. (TMLC), whose initial bid, excluding prior emergency work and

any contingency funds, was $381,276.00. Due to the discovery of additional damage and the determination that certain damaged items had to be replaced rather than repaired, TMLC's bid was later readjusted to $442,663.35, excluding prior emergency repairs and any contingency funds. However, by its subsequent actions, as detailed below, it is apparent that USAA never had any intention on allowing plaintiffs' to use a contractor of their choice, but, rather, a company hand picked by USAA.

12. The day after the fire, Bushaw recommended to USAA that reserves of $500,000 for the restoration of the house and contents and $75,000 for living expenses be established. Bushaw has admitted that he was unaware of what was in the house when the reserves were established, and that the reserve amounts were too low. USAA has shown by their conduct that they did not intend to increase their reserve amounts, or settle the claim for more than the established reserve amounts.

13. On or about December 20, 1990 USAA initiated an estimating process which subsequently revealed a pattern of low bidding, and a time consuming approach which has subjected plaintiffs to unreasonable delay and harassment. The following briefly outlines USAA's low bidding pattern:

a. USAA CompuClaim estimate dated December 20, 1990 in the amount of $116,587.85;

b. The revised USAA CompuClaim estimate of January, 1991 in the amount of $160,460.35;

c. Clark-Porsche Construction Company estimate dated February 15, 1991 in the amount of $223,859.36;

d. Clark-Porsche Construction Company estimate dated March 5, 1991 for $251,407.28;

e. Clark-Porsche Construction Company revised March 5, 1991 estimate of $258,513.28;

f. Clark-Porsche Construction Company revised March 5, 1991 estimate of $287,589.60;

g. Clark-Porsche Construction Company estimate dated May 24, 1991 in the amount of $301,019.38;

h. Clark-Porsche Construction Company revised May 24, 1991 estimate of $319,019.38.

14. The CompuClaim estimates which were offered to plaintiffs by USAA were meaningless as USAA is not in the business of home restoration, and no construction contractor had agreed to repair the structure for either amount. After retaining the services of Clark-Porsche Construction Co., Inc. ("Clark-Porsche"), a construction company whose livelihood depends almost entirely upon the insurance industry, USAA continued the "lowbid" estimating approach. Presently, despite the extensive six and one half month delay in adjusting this claim, defendant's estimate is still substantially less than that required to adequately repair or replace the damaged property with like kind and quality materials and workmanship.

15. An example of defendant's estimating process is contained in Clark-Porsche's initial $223,859.36 estimate of February 15, 1991. That estimate included a notation

that no guarantee could be given on the roof repairs, did not specify the contemplated restoration work and failed to identify the type and quality of materials that Clark-Porsche used in making its estimate. As plaintiffs' residence contained numerous special items, including, but not limited to, elaborately milled, solid, mahogany doors finished in antique red stain and gold leaf edging, it was of utmost concern to plaintiffs that replacement be sufficient to provide restoration workmanship and materials consistent with the quality of the original residential construction. Clark-Porsche's failure to specify the particulars of replacement and repair, and USAA's failure to inquire or investigate the numerous special items at plaintiffs' residence did not meet the Policy's provisions nor did it meet plaintiffs' expectations as to coverage under the Policy. However, this did not prevent USAA from demanding that plaintiffs accept this initial estimate as the true cost of restoration.

16. On or about March 11, 1991 plaintiffs met with Bushaw to discuss the low bid proposal of USAA's fire restoration company, Clark-Porsche. Instead of providing a comprehensive description of the actual work that Clark-Porsche would perform and a statement of the materials to be used, Bushaw demanded that plaintiffs' contractor match the lower, unsubstantiated, incomplete and inadequate figures of Clark-Porsche.

17. From the time the huge restoration differences appeared in TMLC's and Clark-Porsche's proposals, USAA constantly insisted that TMLC justify and reevaluate their bids and make their estimates available to USAA. But, USAA would not reciprocate by providing plaintiffs a complete Clark-Porsche estimate. This is

despite repeated requests by plaintiffs to explain how proper restoration could be accomplished at this proposed bargain basement price. These repeated requests by plaintiffs were necessitated by obviously erroneous aspects of the estimate such as the amounts allocated to cabinets and carpentry. Another example was the antique silver Waterford chandelier, with an estimated value range of $18,000 to $24,000, which Clark-Porsche had listed at $3,500. According to Bushaw, the $3,500 price was established by counting the number of tiers that were left from a picture of the remains, even though most of the fixture was gone.

18. According to the provisions of the Policy, USAA agreed to pay the reasonable cost incurred for necessary measures taken solely to protect against further damage. At the request of plaintiffs, TMLC took appropriate measures to guard against vandalism and to minimize the loss until the contents of the residence could be removed. A $14,004 bill for these services was submitted to USAA. Initially, USAA refused to pay this covered expense. During the March 11, 1991 meeting, after having been told that TMLC might file a lien against the property for these expenditures, USAA finally agreed to pay $13,845.93, approximately 3 months after incurring this expense.

19. Plaintiffs and TMLC continued to cooperate with defendant by providing complete and detailed information regarding the nature and scope of the repairs that were necessary to recapture the pre fire quality of plaintiffs' residence. USAA then had no alternative but to reluctantly increase its estimate to match the substantial evidence plaintiffs submitted.

20. However, as Clark-Porsche's proposal still did not provide the full extent of benefits required under the Policy, on or about April 1, 1991 plaintiffs wrote to Ray Roe, a Property Specialist at USAA, whom plaintiffs believed would make the final determination. Plaintiffs requested written statements of all the benefits which USAA intended to provide for restoration and reconstruction of the residence; living expenses to be provided; restoration and reconditioning of the contents including requirements concerning purchasing and replacement of destroyed items; and specification of restoration work and materials contemplated under USAA's most recent proposal.

21. Plaintiffs wrote to Bushaw on or about April 2, 1991 regarding the fair rental value of their home. At USAA's request, plaintiffs had, in December, 1990 obtained three separate statements regarding the amount of fair rental value, and had timely submitted them to USAA. USAA did not, until February, 1991, verbally agree upon the amount of $11,083 per month. During the March 11, 1991 meeting with plaintiffs, Bushaw wanted plaintiffs to enter into an agreement limiting the length of time for payment of the fair rental value, thereby denying them the full amount of benefits to which they were entitled under the Policy provisions. Plaintiffs refused, and as of the April 2, 1991 letter, approximately four months after the fire, defendant still had failed to provide a written confirmation of the agreed amount and had failed to advise how and when the fair rental value payment would be made, despite numerous requests by plaintiffs. According to Bushaw, he had not submitted any living expenses for payment as USAA wanted a

package proposal submitted even though this procedure worked an undue hardship on plaintiffs by delaying benefit payments.

22. On or about April 11, 1991 plaintiffs met with Bushaw and Bill Hooper, of USAA's Home Office. During that meeting Hooper spent almost two hours trying to force Clark-Porsche's bid upon plaintiffs. Bushaw threatened to take over the construction and have defendant do the work in an effort to make plaintiffs accept the low Clark-Porsche bid. Plaintiffs refused the offer and requested a copy of the claim file during this meeting and were informed that the only documents in the claim file were a three column worksheet, Clark-Porsche's proposal and TMLC's proposal. There were notes submitted by Bushaw, however USAA declined to produce these, stating that they were work product.

23. On or about May 30, 1991 defendant, by and through Bushaw, having already delayed repair of the property for approximately five and a half months, finally offered their package proposal which attempted to compromise plaintiffs' claim for less than the Policy benefits to which plaintiffs are entitled, as evidenced by, but not limited to, the following:

(a) The revised complete and final repair estimate submitted by Clark-Porsche was $319,019.38, far less than the repair estimate of $442,663.35 obtained by plaintiffs, and certainly not sufficient to return plaintiffs' dwelling to its pre fire condition.

(b) Defendant intentionally misrepresented Policy provisions by categorizing the "hold back" money as depreciation. The Policy clearly states that under the full

replacement cost coverage depreciation will not be deducted.

(c) Defendant has arbitrarily established the Fair Rental Value to be limited to nine months. USAA's May proposal is totally unrealistic as the Policy does not contain any time limitations other than that it be reasonable. Due to defendant's unreasonable delay and lowbid estimating patterns, this nine month proposal demonstrates USAA's lack of good faith and fair dealing. USAA's May proposal allows only two and one half months to accomplish complete restoration of plaintiffs' residence, assuming repairs were initiated immediately.

(d) Erroneously including drapery under the dwelling reconstruction cost instead of personal property, when the Policy is silent with respect to drapery classification.

PLAINTIFFS, LAUGHLIN E. WATERS and VOULA D. WATERS, FOR A FIRST CAUSE OF ACTION AGAINST DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION, FOR BREACH OF THE COVENANT OF GOOD FAITH AND FAIR DEALING, ALLEGE:

24. Plaintiffs refer to each and every paragraph contained in the General Allegations and incorporates those paragraphs as though set forth in full in this cause of action.

25. Defendant, USAA, has breached its duty of good faith and fair dealing owed to plaintiffs in the following respects:

(a) Unreasonably and in bad faith telling plaintiffs that they could use the contractor of their choice and then applying relentless pressure upon plaintiffs to use USAA's handpicked company, Clark-Porsche; offering plaintiffs a total money settlement of plaintiffs' fire loss which was based on defendant's knowing, deliberate and improper interpretation and application of Policy provisions regarding depreciation, fair rental value, and time restrictions or limitations; and, deliberately and wrongfully apportioning part of the settlement offer under incorrect Policy coverages in amounts which defendant knew to be substantially less than the amounts to which plaintiffs were and are entitled to under the terms of the Policy.

(b) Unreasonably delaying payments to plaintiffs in bad faith knowing plaintiffs' claim for benefits under the policy to be valid in an attempt to coerce plaintiffs' into accepting a repair proposal by USAA's fire restoration company that was substantially less than that required to repair or replace the damaged property.

(c) Unreasonably misrepresenting to plaintiffs pertinent insurance policy provisions relating to the coverage in issue by categorizing the "hold back" money as depreciation, when the Policy clearly states that under the full replacement cost coverage depreciation will not be deducted; and by limiting the period of time for payment of the Fair Rental Value when the specific Policy provisions did not so restrictively limit the payment.

(d) Failing to reasonably investigate and process plaintiff's claim as had USAA adequately investigated the proposal by its contractor, Clark-Porsche, it

would have determined that the bid did not state the proper value for restoration of plaintiffs' property, as evidenced by, but not limited to, the attempt to place a price of $3,500 on an antique silver Waterford chandelier valued at between $18,000 and $24,000, nor did it adequately provide the full extent of benefits due under the Policy.

(e) Unreasonably and in bad faith attempting to induce plaintiffs to settle or compromise their claim for less than the amount to which plaintiffs were reasonably entitled, in that defendant withheld sums due and owing to plaintiffs, knowing that withholding such sums would impair and jeopardize plaintiffs' financial situation, and thus coerce plaintiffs to settle their claim for a sum less than they were reasonably entitled to under the Policy.

(f) Not attempting in good faith to effectuate a prompt, fair and equitable settlement of plaintiffs' claim for benefits in which liability has become reasonably clear for the reasons set forth in subsections (a), (b), (c), (d) and (e) above.

26. As a proximate result of the aforementioned unreasonable and bad faith conduct of defendant, plaintiffs have suffered, and will continue to suffer in the future, damages under the Policy, plus interest, and other economic and consequential damages, for a total amount to be shown at the time of trial.

27. As a further proximate result of the aforementioned wrongful conduct of defendant, plaintiffs have suffered anxiety, worry, mental and emotional distress, all to plaintiffs' general damage in a sum to be determined at the time of trial.

28. As a further proximate result of the unreasonable and bad faith conduct of defendant, plaintiffs were compelled to retain legal counsel to obtain the benefits due under the Policy. Therefore, defendant is liable to plaintiffs for those attorneys' fees reasonably necessary and incurred by plaintiffs in order to obtain the Policy benefits in a sum to be determined at trial.

29. Defendant's conduct described herein was intended by the defendant to cause injury to plaintiffs or was despicable conduct carried on by the defendant with a willful and conscious disregard of the rights of plaintiffs, subjected plaintiffs to cruel and unjust hardship in conscious disregard of plaintiffs' rights, and was an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention to deprive plaintiff of property, legal rights or to otherwise cause injury, such as to constitute malice, oppression or fraud under California Civil Code section 3294, thereby entitling plaintiffs to punitive damages in an amount appropriate to punish or set an example of defendant.

WHEREFORE, plaintiffs pray for judgment against defendant as follows:

1. Damages for failure to provide benefits under the policy, plus interest, including prejudgment interest, and other economic and consequential damages, in a sum to be determined at the time of trial;

2. General damages for mental and emotional distress in a sum to be determined at the time of trial;

3. For attorney's fees incurred by plaintiffs to obtain the policy benefits in an amount to be determined at trial;

4. Punitive and exemplary damages in an amount appropriate to punish or set an example of defendant;

5. For costs of suit incurred herein; and

6. For such other and further relief as the Court deems just and proper.

Dated this 5 day of July 1991, at Claremont, California.

SHERNOFF, BIDART
& DARRAS

By: /s/ William M. Shernoff
WILLIAM M. SHERNOFF
Attorneys for Plaintiffs

JURY DEMAND

Plaintiff hereby demands a trial by jury.

SHERNOFF, BIDART
& DARRAS

By: /s/ William M. Shernoff
WILLIAM M. SHERNOFF

EXHIBIT A

USAA 165 45 98 92A

LAUGHLIN E WATERS
CPT USA RET
112 NORTH JUNE STREET
LOS ANGELES CA 90004-1040

HOMEOWNERS
INDEX OF PACKET CONTENTS

Your insurance package is separated into two distinct categories. CATEGORY I contains policy specifications, coverages, conditions, and exclusions. CATEGORY II (if applicable) contains additional, important information that is not a part of your policy, but should be read carefully and then kept with your policy papers. NOTE: Any premium charge or return will be reflected on your next regular monthly statement. Please do not disregard your current billing statement.

CATEGORY I

FORM #	TITLE
HO-D	– DECLARATIONS
HO-END	– ENDORSEMENT DECLARATIONS
HO-3R	– SPECIAL FORM CONTRACT
HO-CA	– SPECIAL PROVISIONS
HO-90R CA	– WORKERS COMPENSATION
HO-216R	– PREMISES ALARM
HO-728R	– REPLACEMENT COST END.
HO-978R	– ADJUSTED BUILDING COST

CATEGORY II

FORM #	TITLE
320CA	– COMPLAINT NOTICE
960	– INFORMATION PRACTICES
1991	– WORKERS' COMPENSATION
11663	– STATE PREMIUM SURCHARGE

FOR U.S. CALLS: Policy Service 1-800-531-8111. Claims 1-800-531-8222.

EXCEPTIONS: Auto Claims in AK or HI – see your local Directory. If you are in the Washington D.C. Metro Area (Claims only), Colorado Springs, Denver, Highland Falls, Sacramento, San Antonio or Tampa, please see your LOCAL DIRECTORY for Policy Service and Claims.

PAGE 2
MAIL MACH-1

UNITED SERVICES AUTOMOBILE ASSOCIATION

LOGO

USAA Building – San Antonio, Texas 78228
HOMEOWNERS POLICY DECLARATIONS

This Declarations Page forms a part of your Homeowners policy. Please keep it with your policy papers.

Policy Number
USAA 165 45 98 92A

[illegible] Insured and Property Location
LAUGHLIN E WATERS AND
VOULA D WATERS HELD AS
COMMUNITY PROPERTY
112 NORTH JUNE STREET
LOS ANGELES, LOS ANGELES, CA 90004

POLICY PERIOD: From 07-15-90

To 07-15-91

(12:01 A.M. standard time at location of the principal reside [sic])

Coverage is provided where a premium or limit of liability is shown for the coverage.

Section I Coverages and Limit of Liability

A. Dwelling	C. Personal Property	D. Loss of Use
$1,615,000	$1,615,000	$323,000

Section II Coverages and Limit of Liability

E. Personal Liability Each occurrence	F. Medical Payments to Others Each person
$300,000	$5,000

Premium

[Basic] Policy Premium	Additional Premiums	Credits	Total Premium
$7,067	$704	$3,170CR	$4,601

STATE PREMIUM SURCHARGE $46.01

[illegible] and Endorsements made part of this policy at time of issue: HO 3 R, (01-88), HO-END (01-89), HO-CA (07-89), HO-978R (01-88), HO-216R (01-88), HO-728R (01-88), HO-90RCA (01-88).

DEDUCTIBLE – SECTION I $1000 ALL PERILS.

case of loss under Section 1 we cover only that part of the loss over the deductible stated.

MORTGAGEE (Name and Address)

Assignment of this policy shall not be valid except with the written consent of the Company.

WITNESS WHEREOF, this policy is signed on 05/21/90

/s/ Robert F. McDermott
Robert F. McDermott
Brigadier General, USAF (Retired)
Attorney-in-Fact

(Illegible) Ed 6-89

UNITED SERVICES AUTOMOBILE ASSOCIATION

HOMEOWNERS ENDORSEMENT DECLARATIONS

Specifically listed below are the Declarations and premiums for endorsements made a part of this Policy at the time of issue. The endorsements are attached stating terms and conditions.

Policy Number
USAA 165 45 98 92A

Policy Term:	07-15-90	07-15-91
	Inception	Expiration

HO-978R (01-88), ADJUSTED BUILDING COST ENDORSEMENT

TOTAL TERM PREMIUM NIL
HO-216R (01-88) PREMISES ALARM SYSTEM

TOTAL TERM PREMIUM $1057CR
HO-728R (01-88) REPLACEMENT COST ON CONTENTS ENDORSEMENT

TOTAL TERM PREMIUM $704
HO-90RCA (01-88) WORKERS' COMPENSATION AND EMPLOYERS LIABILITY INSURANCE ENDORSEMENT – CALIFORNIA

TOTAL TERM PREMIUM IS INCLUDED
HO-END-Ed. Illegible-89 5-21-90

USAA GROUP
USAA Building • San Antonio, Texas 78288

This is your Easy Reading

HOMEOWNERS POLICY.
The homeowners insurance contract between you and us consists of this policy plus your Declarations page and any applicable endorsements. The Quick Reference section below outlines essential information contained in the Declarations and the major parts of the policy.

Your policy provides the coverages and amounts of insurance shown in the Declarations with a premium.

READ YOUR POLICY, DECLARATIONS, AND ENDORSEMENTS CAREFULLY.

QUICK REFERENCE

DECLARATIONS PAGE
Your Name
Location of Your Residence
Policy Period
Coverages
Amounts of Insurance
Deductible

Beginning on Page

2 AGREEMENT
2 DEFINITIONS
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Loss of Use
Additional Coverages
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Trees, Shrubs and Plants
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Damage to Property Of Others

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17 CONDITIONS
Policy Period
Cancellation
Non-Renewal

RECIPROCAL PROVISIONS . . .

apply when United Services Automobile Association or USAA, is named on the Declarations as the Company.

A non-assessable policy

- Reciprocals
- Special definitions and provisions
- Plan of operation

In your policy these sets of words have the same meaning: Policy means Contract: You, Your or Insured means Subscriber: We, us, our, USAA or Company means Reciprocal or Interinsurance Exchange: Premium means Deposit: Chairman means Attorney-in-Fact.

Your policy is issued as part of an Interinsurance Exchange by the Chairman of USAA as Attorney-in-Fact under the authority given him by the subscribers.

No Contingent Liability: You are liable only for the amount of your premium since USAA has a free surplus in excess of the amount required by Article 19.03 of the Texas Insurance Code of 1951, as amended.

Participation: By purchasing this policy, you are a member of USAA and subject to its bylaws. You are

entitled to dividends as may be declared by us, after approval as required by the Texas Insurance Code of 1951, as amended.

AGREEMENT

We will provide the insurance described in this policy in return for the premium and compliance with all applicable provisions of this policy.

DEFINITIONS

In this policy, "you" and "your" refer to the "named insured" shown in the Declarations and the spouse if a resident of the same household. "We", "us" and "our" refer to the Company providing this insurance. In addition certain words and phrases are defined as follows:

1. "bodily injury" means bodily harm, sickness or disease, including required care, loss of services and death that results.
2. "business" includes trade, profession or occupation.
3. "insured" means you and residents of your household who are:
   a. your relatives; or
   b. other persons under the age of 21 and in the care of any person named above.

   Under SECTION II, "insured" also means:

   c. with respect to animals or watercraft to which this policy applies, any person or organization

legally responsible for these animals or watercraft which are owned by you or any person included in 3a or 3b above. A person or organization using or having custody of these animals or watercraft in the course of any business or without consent of the owner is not an insured;

d. with respect to any vehicle to which this policy applies:

(1) persons while engaged in your employ or that of any person included in 3a or 3b above; or

(2) other persons using the vehicle on an insured location with your consent.

4. "insured location" means:

a. the residence premises;

b. the part of other premises, other structures and grounds used by you as a residence;

c. any premises used by you in connection with a premises in 4a or 4b above;

d. any part of a premises:

(1) not owned by an insured; and

(2) where an insured is temporarily residing;

e. vacant land, other than farm land, owned by or rented to an insured;

f. land owned by or rented to an insured on which a one or two family dwelling is being built as a residence for an insured;

g. individual or family cemetery plots or burial vaults of an insured; or

h. any part of a premises occasionally rented to an insured for other than business use.

5. "occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions, which results, during the policy period in

   a. bodily injury; or

   b. property damage.

6. "property damage" means physical injury to, destruction of, or loss of use of tangible property.

7. "residence employee" means:

   a. an employee of an insured whose duties are related to the maintenance or use of the residence premises, including household or domestic services; or

   b. one who performs similar duties elsewhere not related to the business of an insured.

8. "residence premises" means:

   a. the one family dwelling, other structures, and grounds; or

   b. that part of any other building;

   where you reside and which is shown as the "residence premises" in the Declarations.

   "Residence premises" also means a two family dwelling where you reside in at least one of the family units and which is shown as the "residence premises" in the Declaration.

SECTION I – PROPERTY COVERAGES

COVERAGE A – DWELLING

We cover:

1. the dwelling on the residence premises shown in the Declarations, including structures attached to the dwelling;
2. materials and supplies located on or next to the residence premises used to construct, alter or repair the dwelling or other structures on the residence premises; and
3. permanently installed carpeting.

This coverage does not apply to land, including land on which the dwelling is located.

COVERGE B – Other Structures

We cover other structures on the residence premises set apart from the dwelling by clear space. This includes structures connected to the dwelling by only a fence, utility line, or similar connection.

This coverage does not apply to land, including land on which the other structures are located.

We do not cover other structures:

1. used in whole or in part for business; or
2. rented or held for rental to any person not a tenant of the dwelling, unless used solely as a private garage.

The limit of liability for this coverage will not be more than 10% of the limit of liability that applies to Coverage A. Use of this coverage does not reduce the Coverage A limit of liability.

COVERAGE C – Personal Property

Subject to the Special Limits of Liability and Property Not Covered provisions below, we cover personal property owned or used by an insured while it is anywhere in the world. At your request, we will cover personal property owned by:

1. others while the property is on the part of the residence premises occupied by an insured;
2. a guest or a residence employee, while the property is in any residence occupied by an insured.

Our limit of liability for personal property usually located at an insured's residence, other than the residence premises, is 10% of the limit of liability for Coverage C, or $1,000, whichever is greater. Personal property in a newly acquired principal residence is not subject to this limitation for the 30 days from the time you begin to move the property there.

Special Limits of Liability. These limits do not increase the Coverage C limit of liability. The special limit for each numbered category below is the total limit for each loss for all property in that category.

1. $200 on money, bank notes, bullion, gold other than goldware, silver other than silverware, platinum, coins and medals.

2. $1,000 on securities, accounts, deeds, evidences of debt, letters of credit, notes other than bank notes, manuscripts, personal records, passports, tickets and stamps. This limit includes the cost to research, replace or restore the information from the lost or damaged material. This dollar limit applies to these categories regardless of the medium (such as paper or computer software on which the material exists.

3. $1,000 on watercraft, including their trailers, furnishings, equipment and outboard motors.

4. $1,000 on trailers not used with watercraft.

5. $1,000 on grave markers.

6. $1,000 for loss by theft of jewelry, watches, furs, precious and semi-precious stones.

7. $2,000 for loss by theft of firearms.

8. $2,500 for loss by theft of silverware, silver-plated ware, goldware, gold-plated ware and pewterware. This includes flatware, hollowware, tea sets, trays and trophies made of or including silver, gold or pewter.

9. $2,500 on property, on the residence premises, used at any time or in any manner for any business purpose.

10. $250 on property, away from the residence premises, used at any time or in any manner for any business purpose.

11. $3,000 on motorized golf carts and their equipment and accessories. But if, at the time of loss, there is an automobile policy covering physical loss to golf carts, then this policy does not apply to those golf carts and their equipment and accessories.

Property Not Covered. We do not cover:

1. articles separately described and specifically insured in this or other insurance;

2. animals, birds or fish;

3. motor vehicles or all other motorized land conveyances. This includes:

   a. equipment and accessories; or

   b. any device or instrument for the transmitting, recording, receiving or reproduction of sound or pictures which is operated by power from the electrical system of motor vehicles or all other motorized land conveyances, including:

      (1) accessories or antennas; or

      (2) tapes, wires, records, discs or other media for use with any such device or instrument;

   while in or upon the vehicle or conveyance.

   We do cover vehicles or conveyances not subject to motor vehicle registration which are:

   a. used to service an insured's residence; or

   b. designed for assisting the handicapped.

   We also cover motorized golf carts and their equipment and accessories, subject to the provisions under Special Limits of Liability.

4. aircraft and parts. Aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo;

5. property of roomers, boarders and other tenants, except property of roomers and boarders related to an insured;

6. property in an apartment regularly rented or held for rental to others by an insured;

7. property rented or held for rental to others off the residence premises;

8. business data, including such data stored in:

   a. books of account, drawings or other paper records; or

   b. electronic data processing tapes, wires, records, discs or other software media.

   However, we do cover the cost of (illegible) recording or storage media, and of pre-recorded computer programs available on the retail market.

9. credit cards or fund transfer cards except as provided in ADDITIONAL COVERAGES.

COVERAGE D – Loss Of use

The limit of liability for Coverage D is the total limit for all the coverages that follow.

1. If a loss caused by a Peril Insured Against makes that part of the residence premises where you reside not fit to live in, we cover, at your choice, either of the following. However, if the residence premises is not your principal place of residence, we will not provide the option under paragraph b below.

   a. Additional Living Expense, meaning any necessary increase in living expenses incurred by you so that your household can maintain its normal standard of living; or

   b. Fair Rental Value, meaning the fair rental value of that part of the residence premises where you reside less any expenses that do not continue while the premises is not fit to live in.

Payment under a. or b. will be for the shortest time required to repair or replace the damage or, if you permanently relocate, the shortest time required for your household to settle elsewhere.

2. If a loss caused by a Peril Insured Against makes that part of the residence premises rented to others or held for rental by you not fit to live in, we cover the:

   Fair Rental Value, meaning the fair rental value of that part of the residence premises rented to others or held for rental by you less any expenses that do not continue while the premises is not fit to live in.

   Payment will be for the shortest time required to repair or replace that part of the premises rented or held for rental.

3. If a civil authority prohibits you from use of the residence premises as a result of direct damage to neighboring premises by a Peril Insured Against in this policy, we cover the Additional Living Expense or Fair Rental Value loss as provided under 1 and 2 above for no more than two weeks.

The periods of time under 1, 2 and 3 above are not limited by expiration of this policy.

We do not cover loss or expense due to cancellation of a lease or agreement.

No deductible applies to this coverage.

ADDITIONAL COVERAGES

1. Debris Removal. We will pay your reasonable expense for the removal of:

a. debris of covered property if a Peril Insured Against that applies to the damaged property causes the loss; or

b. ash, dust or particles from a volcanic eruption that has caused direct loss to a building or property contained in a building.

This expense is included in the limit of liability that applies to the damaged property. When the amount payable for the actual damage to the property plus the expense for debris removal exceeds the limit of liability for the damaged property, an additional 5% of that limit of liability will be available to cover debris removal expense.

We will also pay for your reasonable expense, up to $600 in the aggregate, for the removal from the residence premises of:

a. your tree(s) felled by the peril of Windstorm or hail;

b. your tree(s) felled by the peril of Weight of ice, snow or sleet; or

c. a neighbor's tree(s) felled by a Peril Insured Against under Coverage C;

provided the tree(s) damages a covered structure.

2. Reasonable Repairs. In the event that covered property is damaged by an applicable Peril Insured Against, we will pay the reasonable cost incurred by you for necessary measures taken solely to protect against further damage, if the measures taken involve repair to other damaged property, we will pay for those measures only if that property is covered under this policy and the damage to that property is caused by an applicable Peril Insured Against.

This coverage

a. does not increase the limit of liability that applies to the covered property;

b. does not relieve you of your duties, in case of a loss to covered property, as set forth in SECTION I – CONDITIONS 2d.

3. Trees, Shrubs and Other Plants. We cover trees, shrubs, plants or lawns, on the residence premises, for loss caused by the following Perils Insured Against Fire or lightning, Explosion, Riot or civil commotion, Aircraft Vehicles not owned or operated by a resident of the residence premises, Vandalism or malicious mischief or Theft.

   The limit of liability for this coverage will not be more than 5% of the limit of liability that applies to the dwelling, or more than $500 for any one tree, shrub or plant. We do not cover property grown for business purposes.

   This coverage is additional insurance.

4. Fire Department Service Charge. We will pay up to $500 for your liability assumed by contract or agreement for fire department charges incurred when the fire department is called to save or protect covered property from a Peril Insured Against. We do not cover fire department service charges if the property is located within the limits of the city, municipality or protection district furnishing the fire department response.

   This coverage is additional insurance. No deductible applies to this coverage.

5. Property Removed. We insure covered property against direct loss from any cause while being removed from a premises endangered by a Peril

Insured Against and for no more than 30 days while removed. This coverage does not change the limit of liability that applies to the property being removed.

6. Credit Card, Fund Transfer Card, Forgery and Counterfeit Money.

   We will pay up to $1,000 for:

   a. the legal obligation of an insured to pay because of the theft or unauthorized use of credit cards issued to or registered in an insured's name;

   b. loss resulting from theft or unauthorized use of a fund transfer card used for deposit, withdrawal or transfer of funds, issued to or registered in an Insured's name;

   c. loss to an Insured caused by forgery or alteration of any check or negotiable instrument and

   d. loss to an Insured through acceptance in good faith of counterfeit United States or Canadian paper currency.

   We do not cover use of a credit card or fund transfer card:

   a. by a resident of your household:

   b. by a person who has been entrusted with either type of cards; or

   c. if an Insured has not complied with all terms and conditions under which the cards are issued.

   All loss resulting from a series of acts committed by any one person or in which any one person is concerned or implicated is considered to be one loss.

   We do not cover loss arising out of business use or dishonesty of an Insured.

This coverage is additional insurance. No deductible applies to this coverage.

Defense:

a. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to defend a claim or suit ends when the amount we pay for the loss equals our limit of liability.

b. If a suit is brought against an insured for liability under the Credit Card or Fund Transfer Card coverage, we will provide a defense at our expense by counsel of our choice.

c. We have the option to defend at our expense an Insured or an Insured's bank against any suit for the enforcement of payment under the Forgery coverage.

7. Loss Assessment. We will pay up to $1,000 for your share of loss assessment charged during the policy period against you by a corporation or association of property owners, when the assessment is made as a result of direct loss to the property, owned by all members collectively, caused by a Peril Insured Against under Coverage A – Dwelling, other than earthquake or land shock waves or tremors before, during or after a volcanic eruption.

   This coverage applies only to loss assessments charged against you as owner or tenant of the residence premises.

   We do not cover loss assessments charged against you or a corporation or association of property owners by any governmental body.

   The limit of $1,000 is the most we will pay with respect to any one loss, regardless of the number of assessments.

Condition 1. Policy Period, under SECTIONS I and II – CONDITIONS, does not apply to Loss Assessment.

8. Collapse. We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

   a. Perils Insured Against in Coverage C – Personal Property. These perils apply to covered building and personal property for loss insured by this additional coverage:

   b. hidden decay;

   c. hidden insect or vermin damage;

   c. weight of contents, equipment, animals or people;

   e. weight of rain which collects on a roof; or

   f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

   Loss to an awning, fence, patio, pavement, swimming pool, underground pipe, flue, drain, cesspool, septic tank, foundation, retaining wall, bulkhead, pier, wharf or dock is not included under items b, c, d, e and f unless the loss is a direct result of the collapse of a building.

   Collapse does not include settling, cracking, shrinking, bulging or expansion.

   This coverage does not increase the limit of liability that applies to the damaged covered property.

9. Lock Replacement. When the dwelling door keys are stolen in a covered theft loss, we will pay the cost to:

a. change the combination in the lock cylinder of the door locks as needed; or

b. change the lock hardware of the doors as needed.

The limit of liability for Lock Replacement is $250. No deductible applies to this coverage.

10. Food Spoilage. We will pay you up to $500 for loss caused by Power Failure to the contents of a freezer or a refrigerator located on the residence premises.

This coverage does not increase the Coverage C limit of liability. No deductible applies to this coverage. The Power Failure exclusion under SECTION I – EXCLUSIONS, does not apply to Food Spoilage.

SECTION I – PERILS INSURED AGAINST

COVERAGE A – DWELLING and COVERAGE B – OTHER STRUCTURES

We insure against risks of direct loss to property described in Coverages A and B only if that loss is a physical loss to property; however, we do not insure loss:

1. involving collapse, other than as provided in ADDITIONAL COVERAGES. Collapse.

2. caused by:

   a. freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance, or by discharge, leakage or overflow from within the system or appliance caused by freezing. This exclusion

applies only while the dwelling is vacant, unoccupied or being constructed unless you have used reasonable care to:

(1) maintain heat in the building; or

(2) shut off the water supply and drain the system and appliances of water;

b. freezing, thawing, pressure or weight of water or ice, whether driven by wind or not, to a:

(1) fence, pavement, patio or swimming pool;

(2) foundation, retaining wall or bulkhead; or

(3) pier, wharf or dock;

c. theft in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied;

d. vandalism and malicious mischief or breakage of glass and safety glazing materials if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant;

e. constant or repeated seepage or leakage of water or steam over a period of weeks, months or years from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance;

f. (1) wear and tear, marring, deterioration;

(2) inherent vice, latent defect, mechanical breakdown;

(3) smog, rust, mold, wet or dry rot;

(4) smoke from agricultural smudging or industrial operations;

(5) release, discharge or dispersal of contaminants or pollutants;

(6) settling, cracking, shrinking, bulging or expansion of pavements, patios, foundations, walls, floors, roofs or ceilings; or

(7) birds, vermin, rodents, insects or domestic animals.

If any of these cause water damage not otherwise excluded, from a plumbing, heating, air conditioning or automatic fire protective sprinkler system or household appliance, we cover loss caused by the water including the cost of tearing out and replacing any part of a building necessary to repair the system or appliance. We do not cover loss to the system or appliance from which this water escaped.

3. excluded under SECTION I – EXCLUSIONS

Under items 1 and 2, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

COVERAGE C – PERSONAL PROPERTY

We insure for direct physical loss to the property described in Coverage C caused by a peril listed below unless the loss is excluded in SECTION I – EXCLUSIONS.

1. Fire or lightning.

2. Windstorm or hail.

This peril does not include loss to the property contained in a building caused by rain, snow, sleet, sand or dust unless the direct force of wind or hail damages the building causing an opening in a roof

or wall and the rain, snow, sleet, sand or dust enters through this opening.

This peril includes loss to watercraft and their trailers, furnishings, equipment and outboard motors, only while inside a fully enclosed building.

3. Explosion.

4. Riot or civil commotion.

5. Aircraft, including self-propelled missiles and spacecraft.

6. Vehicles.

7. Smoke, meaning sudden and accidental damage from smoke.

   This peril does not include loss caused by smoke from agricultural smudging or industrial operations.

8. Vandalism or malicious mischief.

9. Theft, including attempted theft and loss of property from a known place when it is likely that the property has been stolen.

   This peril does not include loss caused by theft:

   a. committed by an Insured;

   b. in or to a dwelling under construction, or of materials and supplies for use in the construction until the dwelling is finished and occupied; or

   c. from that part of a residence premises rented by an Insured to other than an Insured.

   This peril does not include loss caused by theft that occurs off the residence premises of:

   a. property while at any other residence owned by, rented to, or occupied by an insured, except

while an Insured is temporarily living there. Property of a student who is an insured is covered while at a residence away from home if the student has been there at any time during the 45 days immediately before the loss;

b. watercraft, including their furnishings, equipment and outboard motors; or

c. trailers and campers.

10. Falling objects.

This peril does not include loss to property contained in a building unless the roof or an outside wall of the building is first damaged by a falling object. Damage to the falling object itself is not included.

11. Weight of ice, snow or sleet which causes damage to property contained in a building.

12. Accidental discharge or overflow of water or steam from within a plumbing, heating, air conditioning or automatic fire protective sprinkler system or from within a household appliance. In this peril, a plumbing system does not include a sump pump, sump well or similar device designed to drain water from the foundation area.

This peril does not include loss:

a. to the system or appliance from which the water or steam escaped;

b. caused by or resulting from freezing except as provided in the peril of Freezing below; or

c. on the residence premises caused by accidental discharge or overflow which occurs off the residence premises.

13. Sudden and accidental tearing apart, cracking, burning or bulging of a steam or hot water heating system, an air conditioning or automatic fire protective sprinkler system, or an appliance for heating water.

    This peril does not include loss caused by or resulting from freezing.

14. Freezing of a plumbing, heating, air conditioning or automatic fire protective sprinkler system or of a household appliance.

    This peril does not include loss on the residence premises while the dwelling is unoccupied, unless you have used reasonable care to:

    a. maintain heat in the building; or

    b. shut off the water supply and drain the system and appliances of water.

15. Sudden and accidental damage from artificially generated electrical current. This peril does not include loss to a tube transistor or similar electronic component.

16. Damage by glass or safety glazing material which is part of a building, storm door or storm window.

    This peril does not include loss on the residence premises if the dwelling has been vacant for more than 30 consecutive days immediately before the loss. A dwelling being constructed is not considered vacant.

17. Volcanic eruption other than loss caused by earthquake, land shock waves or tremors.

SECTION I – EXCLUSIONS

1. We do not insure for loss caused directly or indirectly by any of the following. Such loss is excluded regardless of any other cause or event contributing concurrently or in any sequence to the loss.

   a. Ordinance or Law, meaning enforcement of any ordinance or law regulating the construction, repair or demolition of a building or other structure, unless specifically provided under this policy.

   b. Earth Movement, meaning earthquake including land shock waves or tremors before, during or after a volcanic eruption; landslide; mudflow; earth sinking, rising or shifting; unless direct loss by:

      (1) fire;

      (2) explosion; or

      (3) breakage of glass or safety glazing material which is part of a building, storm door or storm window;

      ensues and then we will pay only for the ensuing loss.

      This exclusion does not apply to loss by theft.

   c. Water Damage, meaning:

      (1) flood, surface water, waves, tidal water, overflow of a body of water, or spray from any of these, whether or not driven by wind;

      (2) water which backs up through sewers or drains or which overflows from a sump

pump, sump well or similar device designed to drain water from the foundation area; or

(3) water below the surface of the ground, including water which exerts pressure on or seeps or leaks through a building, sidewalk, driveway, foundation, swimming pool or other structure.

Direct loss by fire, explosion or theft resulting from water damage is covered.

d. Power Failure, meaning the failure of power or other utility service if the failure takes place off the residence premises, except as provided in ADDITIONAL COVERAGES. Food Spoilage. But, if a Peril Insured Against ensues on the residence premises, we will pay only for that ensuing loss.

e. Neglect, meaning neglect of the Insured to use all reasonable means to save and preserve property at and after the time of a loss.

f. War, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.

g. Nuclear Hazard, to the extent set forth in the Nuclear Hazard Clause of SECTION I – CONDITIONS.

h. Intentional Loss, meaning any loss arising out of any act committed;

(1) by or at the direction of an Insured; and

(2) with the intent to cause a loss.

2. We do not insure for loss caused by any of the following. However, any ensuing loss which is not excluded or excepted in this policy is covered.

a. Weather conditions. However, this exclusion only applies if weather conditions contribute in any way with a cause or event excluded in paragraph 1. above to produce the loss;

b. Acts or decisions, including the failure to act or decide, of any person, group, organization or governmental body;

c. Faulty, inadequate or defective:

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) materials used in repair, construction, renovation or remodeling; or

(4) maintenance;

of part or all of any property whether on or off the residence premises.

SECTION I – CONDITIONS

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1. Insurable Interest and Limit of Liability. Even if more than one person has an insurable interest in the property covered, we will not be liable in any one loss.

a. to the Insured for more than the amount of the insured's interest at the time of loss; or

b. for more than the applicable limit of liability.

2. Your Duties After Loss, in case of a loss to covered property, you must see that the following are done:

a. give prompt notice to us or our agent;

b. notify the police in case of loss by theft;

c. notify the credit card or fund transfer card company in case of loss under ADDITIONAL COVERAGES, Credit Card or Fund Transfer Card coverage;

d. (1) protect the property from further damage;

(2) make reasonable and necessary repairs to protect the property; and

(3) keep an accurate record of repair expenses;

e. prepare an inventory of damaged personal property showing the quantity, description, actual cash value and amount of loss. Attach all bills, receipts and related documents that justify the figures in the inventory;

f. as often as we reasonably require:

(1) show the damaged property;

(2) provide us with records and documents we request and permit us to make copies; and

(3) submit to examination under oath, while not in the presence of any other insured, and sign the same;

g. send to us within 60 days after our request, your signed, sworn proof of loss which sets forth, to the best of your knowledge and belief:

(1) the time and cause of loss;

(2) the interest of the insured and all others in the property involved and all liens on the property;

(3) other insurance which may cover the loss;

(4) changes in title or occupancy of the property during the term of the policy;

(5) specifications of damaged buildings and detailed repair estimates;

(6) the inventory of damaged personal property described in 2e above;

(7) receipts for Additional Living Expenses incurred and records that support the Fair Rental Value loss; and

(8) evidence or affidavit that supports a claim under ADDITIONAL COVERAGES. Credit Card, Fund Transfer Card, Forgery and Counterfeit Money coverage, stating the amount and cause of loss

3. Loss Settlement. Covered property losses are settled as follows:

a. (1) Personal property;

(2) Awnings, household appliances, outdoor antennas, and outdoor equipment, whether or not attached to buildings; and

(3) Structures that are not buildings;

at actual cash value at the time of loss but not more than the amount required to repair or replace.

b. Buildings under Coverage A or B at replacement cost without deduction for depreciation, subject to the following:

(1) If, at the time of loss, the amount of insurance in this policy on the damaged building is 80% or more of the full replacement cost of the building immediately before the loss, we will pay the cost to repair or replace, after application of deductible and without deduction for depreciation, but not more than the least of the following amounts:

(a) the limit of liability under this policy that applies to the building;

(b) the replacement cost of that part of the building damaged for like construction and use on the same premises; or

(c) the necessary amount actually spent to repair or replace the damaged building.

(2) If, at the time of loss, the amount of insurance in this policy on the damaged building is less than 80% of the full replacement cost of the building immediately before the loss, we will pay the greater of the following amounts, but not more than the limit of liability under this policy that applies to the building:

(a) the actual cash value of that part of the building damaged; or

(b) that proportion of the cost to repair or replace, after application of deductible and without deduction for depreciation, that part of the building damaged, which the total amount of

insurance in this policy on the damaged building bears to 80% of the replacement cost of the building.

(3) To determine the amount of insurance required to equal 80% of the full replacement cost of the building immediately before the loss, do not include the value of:

(a) excavations, foundations, piers or any supports which are below the undersurface of the lowest basement floor;

(b) those supports in (a) above which are below the surface of the ground inside the foundation walls, if there is no basement; and

(c) underground flues, pipes, wiring and drains.

(4) We will pay no more than the actual cash value of the damage unless:

(a) actual repair or replacement is complete; or

(b) the cost to repair or replace the damage is both:

(i) less than 5% of the amount of insurance in this policy on the building; and

(ii) less than $2,500.

(5) You may disregard the replacement cost loss settlement provisions and make claim under this policy for loss or damage to buildings on an actual cash value basis. You may then make claim within 180 days after loss for any additional liability on a replacement cost basis.

4. Loss to a Pair or Set. In case of loss to a pair or set we may elect to:

   a. repair or replace any part to restore the pair or set to its value before the loss; or

   b. pay the difference between actual cash value of the property before and after the loss.

5. Glass Replacement. Loss for damage to glass caused by a Peril Insured Against will be settled on the basis of replacement with safety glazing materials when required by ordinance or law.

6. Appraisal. If you and we fail to agree on the amount of loss, either may demand an appraisal of the loss. In this event, each party will choose a competent appraiser within 20 days after receiving a written request from the other. The two appraisers will choose an umpire. If they cannot agree upon an umpire within 15 days, you or we may request that the choice be made by a judge of a court of record in the state where the residence premises is located. The appraisers will separately set the amount of loss. If the appraiser's submit a written report of an agreement to us, the amount agreed upon will be the amount of loss. If they fail to agree, they will submit their differences to the umpire. A decision agreed to by any two will set the amount of loss.

   Each party will:

   a. pay its own appraiser; and

   b. bear the other expenses of the appraisal and umpire equally.

7. Other Insurances. If a loss covered by this policy is also covered by other insurance, we will pay only the proportion of the loss that the limit of liability that applies under this policy bears to the total amount of insurance covering the loss.

This policy does not apply to motorized golf carts and their equipment and accessories when an automobile policy also applies.

8. Suit Against Us. No action can be brought unless the policy provisions have been complied with and the action is started within one year after the date of loss.

9. Our Option. If we give you written notice within 30 days after we receive your signed, sworn proof of loss, we may repair or replace any part of the damaged property with like property.

10. Loss Payment. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 60 days after we receive your proof of loss and:

    a. reach an agreement with you;

    b. there is an entry of a final judgment; or

    c. there is a filing of an appraisal award with us.

11. Abandonment of Property. We need not accept any property abandoned by an insured.

12. Mortgage Clause. The word "mortgagee" includes trustee.

    If a mortgagee is named in this policy, any loss payable under Coverage A or B will be paid to the mortgagee and you as interests appear. If more than one mortgagee is named, the order of payment will be the same as the order of precedence of the mortgages.

    If we deny your claim, that denial shall not apply to a valid claim of the mortgagees, if the mortgagee:

a. notifies us of any change in ownership, occupancy or substantial change in risk of which the mortgagee is aware;

b. pays any premium due under this policy on demand if you have neglected to pay the premium; and

c. submits a signed, sworn statement of loss within 60 days after receiving notice from us of your failure to do so. Policy conditions relating to Appraisal, Suit Against Us and Loss Payment apply to the mortgagee.

If the policy is cancelled or not renewed by us, the mortgagee will be notified at least 10 days before the date cancellation or non-renewal takes effect.

If we pay the mortgagee for any loss and deny payment to you:

a. we are subrogated to all the rights of the mortgagee granted under the mortgage on the property; or

b. at our option, we may pay to the mortgagee the whole principal on the mortgage plus any accrued interest. In this event, we will receive a full assignment and transfer of the mortgage and all securities held as collateral to the mortgage debt.

Subrogation will not impair the right of the mortgagee to recover the full amount of the mortgagee's claim.

13. No Benefit to Bailee. We will not recognize any assignment or grant any coverage that benefits a person or organization holding, storing or moving property for a fee regardless of any other provision of this policy.

14. "Nuclear Hazard" Clause.

    a. "Nuclear Hazard" means any nuclear reaction, radiation, or radioactive contamination, all whether controlled or uncontrolled or however caused, or any consequence of any of these.

    b. Loss caused by the "Nuclear Hazard" will not be considered loss caused by fire, explosion or smoke, whether these perils are specifically named in or otherwise included within the Perils Insured Against in SECTION 1.

    c. This policy does not apply under SECTION 1 to loss caused directly or indirectly by "Nuclear Hazard", except that direct loss by fire resulting from the "Nuclear Hazard" is covered.

15. Recovered Property. If you or we recover any property for which we have made payment under this policy, you or we will notify the other of the recovery. At your option, the property will be returned to or retained by you, or it will become our property. If the recovered property is returned to or retained by you, the loss payment will be adjusted based on the amount you received for the recovered property.

16. Volcanic Eruption Period. One or more volcanic eruptions that occur within a 72-hour period will be considered as one volcanic eruption.

SECTION II – LIABILITY COVERAGES

COVERAGE E – Personal Liability

If a claim is made or a suit is brought against an Insured for damages because of bodily injury or property damage

caused by an occurrence to which this coverage applies, we will:

1. pay up to our limit of liability for the damages for which the insured is legally liable; and

2. provide a defense at our expense by counsel of our choice, even if the suit is groundless, false or fraudulent. We may investigate and settle any claim or suit that we decide is appropriate. Our duty to settle or defend ends when the amount we pay for damages resulting from the occurrence equals our limit of liability.

COVERAGE F – Medical Payments To Others

We will pay the necessary medical expenses that are incurred or medically ascertained within three years from the date of an accident causing bodily injury. Medical expenses means reasonable charges for medical, surgical, x-ray, dental, ambulance, hospital, professional nursing, prosthetic devices and funeral services. This coverage does not apply to you or regular residents of your household except residence employees. As to others, this coverage applies only:

1. to a person on the insured location with the permission of an insured; or

2. to a person off the insured locations, if the bodily injury:

   a. arises out of a condition on the insured location or the ways immediately adjoining;

   b. is caused by the activities of an insured;

   c. is caused by a residence employee in the course of the residence employee's employment by an insured; or

d. is caused by an animal owned by or in the care of an insured.

SECTION II – EXCLUSIONS

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1. Coverage E – Personal Liability and Coverage F – Medical Payments to Others do not apply to bodily injury or property damage:

   a. which is expected or intended by the Insured;

   b. (1) arising out of or in connection with a business engaged in by an Insured. This exclusion applies but is not limited to an act or omission, regardless of its nature or circumstance. Involving a service or duty rendered, promises, owed, or implied to be provided because of the nature of the business;

   (2) arising out of the rental or holding for rental of any part of any premises by an Insured. This exclusion does not apply to the rental or holding for rental of an insured location:

   (i) on an occasional basis if used only as a residence;

   (ii) in part for use only as a residence, unless a single family unit is intended for use by the occupying family to lodge more than two roomers or boarders; or

   (iii) in part, as an office, school, studio or private garage;

c. arising out of the rendering of or failure to render professional services;

d. arising out of a premises:

(1) owned by an insured;

(2) rented to an insured; or

(3) rented to others by an insured;

that is not an insured location;

e. arising out of:

(1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured;

(2) the entrustment by an insured of a motor vehicle or any other motorized land conveyance to any person; or

(3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a conveyance excluded in paragraph (1) or (2) above.

This exclusion does not apply to:

(1) a trailer not towed by or carried on a motorized land conveyance;

(2) a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and;

(a) not owned by an insured; or

(b) owned by an insured and on an insured location;

(3) a motorized golf cart when used to play golf on a golf course;

(4) a vehicle or conveyance not subject to motor vehicle registration which is:

(a) used to service an insured's residence;

(b) designed for assisting the handicapped; or

(c) in dead storage on an insured location;

f. arising out of:

(1) the ownership, maintenance, use, loading or unloading of a watercraft described below;

(2) the entrustment by an insured of a watercraft described below to any person; or

(3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using a watercraft described below.

Watercraft

(1) with inboard or inboard-outdrive motor power of more than 50 horsepower owned by or rented to an insured;

(2) that is a sailing vessel, with or without auxiliary power, which is more than 35 feet in length owned by or rented to an insured; or

(3) powered by one or more outboard motors with more than 50 total horsepower if the outboard motor is owned by an insured. But, outboard motors of more than 50 total horsepower are covered for the policy period if:

(a) you acquire them prior to the policy period and:

(i) you declare them at policy inception; or

(ii) your intention to insure is reported to us in writing within 45 days after you acquire the outboard motors;

(b) you acquire them during the policy period.

This exclusion does not apply while the watercraft is stored.

g. arising out of:

(1) the ownership, maintenance, use, loading or unloading of an aircraft;

(2) the entrustment by an insured of an aircraft to any person; or

(3) vicarious liability, whether or not statutorily imposed, for the actions of a child or minor using an aircraft.

An aircraft means any contrivance used or designed for flight, except model or hobby aircraft not used or designed to carry people or cargo.

h. caused directly or indirectly by war, including undeclared war, civil war, insurrection, rebellion, revolution, warlike act by a military force or military personnel, destruction or seizure or use for a military purpose, and including any consequence of any of these. Discharge of a nuclear weapon will be deemed a warlike act even if accidental.

i. which arises out of the transmission of a communicable disease by an insured.

Exclusions d, e, f, and g, do not apply to bodily injury to a residence employee arising out of and in the course of the residence employee's employment by an insured.

2. Coverage E – Personal Liability does not apply to:

a. liability:

(1) for any loss assessment charged against you as a member of an association, corporation or community of property owners;

(2) under any contract or agreement. However, this exclusion does not apply to written contracts:

(a) that directly relate to the ownership, maintenance or use of an insured location; or

(b) where the liability of others is assumed by the insured prior to an occurrence;

unless excluded in (1) above or elsewhere in this policy;

b. property damage to property owned by the Insured;

c. property damage to property rented to, occupied or used by or in the care of the insured. This exclusion does not apply to property damage caused by fire, smoke or explosion;

d. bodily injury to any person eligible to receive any benefits:

(1) voluntarily provided; or

(2) required to be provided;

by the insured under any:

(1) workers' compensation law;

(2) non-occupational disability law; or

(3) occupational disease law;

e. bodily injury or property damage for which an insured under this policy:

(1) is also an insured under a nuclear energy liability policy; or

(2) would be an insured under that policy but for the exhaustion of its limit of liability.

A nuclear energy liability policy is one issued by:

(1) American Nuclear Insurers:

(2) Mutual Atomic Energy Liability Underwriters;

(3) Nuclear Insurance Association of Canada;

or any of their successors:

f. bodily injury to you or an insured within the meaning of part a. or b. of "Insured" as defined.

3. Coverage F – Medical Payments to Others does not apply to bodily injury:

a. to a residence employee if the bodily injury:

(1) occurs off the insured location; and

(2) does not arise out of or in the course of the residence employee's employment by an insured;

b. to any person eligible to receive benefits:

(1) voluntarily provided; or

(2) required to be provided;

under any:

(1) workers' compensation law;

(2) non-occupational disability law; or

(3) occupational disease law;

c. from any:

(1) nuclear reaction;

(2) nuclear radiation; or

(3) radioactive contamination;

all whether controlled or uncontrolled or however caused; or

(4) any consequence of any of these;

d. to any person, other than a residence employee of an insured, regularly residing on any part of the insured location.

SECTION II – ADDITIONAL COVERAGES

We cover the following in addition to the limits of liability:

1. Claim Expenses. We pay:

a. expenses we incur and costs taxed against an insured in any suit we defend;

b. premiums on bonds required in a suit we defend, but not for bond amounts more than the

limit of liability for Coverage E. We need not apply for or furnish any bond;

c. reasonable expense incurred by an insured at our request, including actual loss of earnings (but not loss of other income) up to $50 per day, for assisting us in the investigation or defense of a claim or suit;

d. interest on the entire judgment which accrues after entry of the judgment and before we pay or tender, or deposit in court that part of the judgment which does not exceed the limit of liability that applies;

e. prejudgment interest awarded against the insured on that part of the judgment we pay. If we make an offer to pay the applicable limit of liability, we will not pay any prejudgment interest based on that period of time after the offer.

2. First Aid Expenses. We will pay expenses for first aid to others incurred by an insured for bodily injury covered under this policy. We will not pay for first aid to you or any other Insured.

3. Damage to Property of Others. We will pay, at replacement cost, up to $500 per occurrence for property damage to property of others caused by an Insured.

We will not pay for property damage:

a. to the extent of any amount recoverable under SECTION 1 of this policy;

b. caused intentionally by an insured who is 13 years of age or older;

c. to property owned by an insured;

d. to property owned by or rented to a tenant of an insured or a resident in your household; or

e. arising out of:

(1) a business engaged in by an insured;

(2) any act or omission in connection with a premises owned, rented or controlled by an insured, other than the insured location; or

(3) the ownership, maintenance or use of aircraft, watercraft or motor vehicles or all other motorized land conveyances.

This exclusion does not apply to any motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and not owned by an insured.

4. Loss Assessment. We will pay up to $1,000 for your share of loss assessment charged during the policy period against you by a corporation or association of property owners, when the assessment is made as a result of:

a. bodily injury or property damage not excluded under SECTION II of this policy; or

b. liability for an act of a director, officer or trustee in the capacity as a director, officer or trustee, provided:

(1) the director, officer or trustee is elected by the members of a corporation or association of property owners; and

(2) the director, officer or trustee serves without deriving any income from the exercise of duties which are solely on behalf of a corporation or association of property owners.

This coverage applies only to loss assessments charged against you as owner or tenant of the residence premises.

We do not cover loss assessments charged against you or a corporation or association of property owner's by any governmental body.

Regardless of the number of assessments, the limit of $1,000 is the most we will pay for loss arising out of:

a. one accident, including continuous or repeated exposure to substantially the same general harmful conditions; or

b. a covered act of a directory, officer or trustee. An act involving more than one director, officer or trustee is considered to be a single act

The following do not apply to this coverage:

1. SECTION II, Coverage E – Personal Liability Exclusion 2a(1):

2. Condition 1.Policy Period, under SECTIONS I and II – CONDITIONS.

SECTION II – CONDITIONS

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1. Limit of Liability. Our total liability under Coverage E for all damages resulting from any one occurrence will not be more than the limit of liability for Coverage E as shown in the Declarations. This limit is the same regardless of the number of insureds, claims made or persons injured. All bodily injury and property damage resulting from any one accident or from continuous or repeated exposure to substantially the

same general harmful conditions shall be considered to be the result of one occurrence.

Our total liability under Coverage F for all medical expenses payable for bodily injury to one person as the result of one accident will not be more than the limit of liability for Coverage F as shown in the Declarations.

2. Severability of Insurance. This insurance applies separately to each insured. This condition will not increase our limit of liability for any one occurrence.

3. Duties After Loss. In case of an accident or occurrence, the insured will perform the following duties that apply. You will help us by seeing that these duties are performed:

   a. give written notice to us or our agent as soon as is practical, which sets forth:

      (1) the identity of the policy and insured;

      (2) reasonably available information on the time, place and circumstances of the accident or occurrence; and

      (3) names and addresses of any claimants and witnesses;

   b. promptly forward to us every notice, demand, summons or other process relating to the accident or occurrence;

   c. at our request, help us:

      (1) to make settlement;

      (2) to enforce any right of contribution or indemnity against any person or organization who may be liable to an Insured;

      (3) with the conduct of suits and attend hearings and trials;

(4) to secure and give evidence and obtain the attendance of witnesses;

d. under Damage to Property of Others, submit to us within 80 days after the loss, a sworn statement of loss and show the damaged property, if in the insured's control;

e. the insured will not, except at the insured's own cost, voluntarily make payment, assume obligation or incur expense other than for first aid to others at the time of the bodily injury.

4. Duties of an Injured Person – Coverage F – Medical Payments to Others. The injured person or someone acting for the injured person will:

a. give us written proof of claim, under oath if required, as soon as is practical; and

b. authorize us to obtain copies of medical reports and records.

The injured person will submit to a physical exam by a doctor of our choice when and as often as we reasonably require.

5. Payment of Claim – Coverage F – Medical payments to Others. Payment under this coverage is not an admission of liability by an insured or us.

6. Suit Against Us. No action can be brought against us unless there has been compliance with the policy provisions.

No one will have the right to join us as a party to any action against an insured. Also, no action with respect to Coverage E can be brought against us until the obligation of the insured has been determined by final judgment or agreement signed by us.

7. Bankruptcy of an Insured. Bankruptcy or insolvency of an insured will not relieve us of our obligations under this policy.

8. Other Insurance – Coverage E – Personal Liability. This insurance is excess over other valid and collectible insurance except insurance written specifically to cover as excess over the limits of liability that apply in this policy.

SECTIONS I and II – CONDITIONS

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1. Policy Period. This policy applies only to loss in SECTION I or bodily injury or property damage in SECTION II, which occurs during the policy period.

2. Concealment or Fraud. The entire policy will be void if, whether before or after a loss, an insured has:

   a. intentionally concealed or misrepresented any material fact or circumstance;

   b. engaged in fraudulent conduct; or

   c. made false statements;

   relating to this insurance.

3. Liberalization Clause. If we make a change which broadens coverage under this edition of our policy without additional premium charge, that change will automatically apply to your insurance as of the date we implement the change in your state, provided that this implementation date falls within 60 days prior to or during the policy period stated in the Declarations.

   This Liberalization Clause does not apply to changes implemented through introduction of a subsequent edition of our policy.

4. Waiver or Change of Policy Provisions. A waiver or change of a provision of this policy must be in writing by us to be valid. Our request for an appraisal or examination will not waive any of our rights.

5. Cancellation.

   a. You may cancel this policy at any time by returning it to us or by giving us advance written notice of the date cancellation is to take effect.

   b. We may cancel this policy only for the reasons stated below by letting you know in writing of the date cancellation takes effect. This cancellation notice may be delivered to you, or mailed to you at your mailing address shown in the Declarations.

      Proof of mailing will be sufficient proof of notice.

      (1) When you have not paid the premium, we may cancel at any time by letting you know at least 10 days before the date cancellation takes effect.

      (2) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason by letting you know at least 10 days before the date cancellation takes effect.

      (3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel:

         (a) if there has been a material misrepresentation of fact which if known to us would have caused us not to issue the policy; or

(b) if the risk has changed substantially since the policy was issued.

This can be done by letting you know at least 30 days before the date cancellation takes effect.

c. When this policy is canceled, the premium for the period from the date of cancellation to the expiration date will be refunded pro rata.

d. If the return premium is not refunded with the notice of cancellation or when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.

6. Non-Renewal. We may elect not to renew this policy. We may do so by delivering to you, or mailing to you at your mailing address shown in the Declarations, written notice at least 30 days before the expiration date of this policy. Proof of mailing will be sufficient proof of notice.

7. Assignment. Assignment of this policy will not be valid unless we give our written consent.

8. Subrogation. An insured may waive in writing before a loss all rights of recovery against any person. If not waived, we may require an assignment of rights of recovery for a loss to the extent that payment is made by us.

If an assignment is sought, an insured must sign and deliver all related papers and cooperate with us.

Subrogation does not apply under SECTION II to Medical Payments to Others or Damage to property of Others.

9. Death. If any person named in the Declarations or the spouse, if a resident of the same household, dies:

a. we insure the legal representative of the deceased but only with respect to the premises and property of the deceased covered under the policy at the time of death;

b. insured includes:

(1) any member of your household who is an insured at the time of your death, but only while a resident of the residence premises; and

(2) with respect to your property, the person having proper temporary custody of the property until appointment and qualification of a legal representative.

CALIFORNIA SPECIAL PROVISIONS

SECTION I – CONDITIONS

10. Loss Payment, is deleted and replaced by the following:

10. Loss payment. We will adjust all losses with you. We will pay you unless some other person is named in the policy or is legally entitled to receive payment. Loss will be payable 30 days after we receive your proof of loss and:

a. reach an agreement with you;

b. there is an entry of a final judgment: or

c. there is a filing of an appraisal award with us.

SECTIONS I AND II – CONDITIONS

5. Cancellation is deleted and replaced by the following:

a. The person named on the Declarations Page may cancel this policy at any time by giving us written notice. But the cancellation cannot take effect before the date of the notice. Return premium will be computed on a pro rata basis.

b. We may cancel this policy only for the reasons stated below by letting the person named on the Declarations Page know in writing of the date cancellation takes effect. This cancellation notice will be mailed to the person named on the Declarations Page at his mailing address shown in the Declarations.

Proof of mailing will be sufficient proof of notice.

(1) When the person named on the Declarations Page has not paid the premium, we may cancel at any time by letting the person named on the Declarations Page know at least 10 days before the date cancellation takes effect.

(2) When this policy has been in effect for less than 60 days and is not a renewal with us, we may cancel for any reason by notifying the person named on the Declarations Page at least 10 days before the date cancellation takes effect.

(3) When this policy has been in effect for 60 days or more, or at any time if it is a renewal with us, we may cancel for one or more of the following reasons by notifying the person named on the Declarations Page 30 days before the cancellation takes effect.

(a) Conviction of the person named on the Declarations Page of a crime having as one of

its necessary elements an act increasing any hazard insured against.

(b) discovery of fraud or material misrepresentation by either of the following:

1. an insured or his or her representative in obtaining the insurance;

2. the person shown on the Declarations Page or his or her representative in pursuing a claim under this policy;

(c) discovery of grossly negligent acts or omissions by an insured or his or her representative substantially increasing any of the hazards insured against.

(d) physical changes in the insured property which result in the property becoming uninsurable.

d. If, when we cancel this policy, the return premium is not refunded with the notice of cancellation, we will refund it within 25 days after the date cancellation takes effect. If, when the person named on the Declarations cancels this policy, the return premium is not refunded when this policy is returned to us, we will refund it within a reasonable time after the date cancellation takes effect.

6. Non-Renewal is deleted and replaced by the following:

6. Non-Renewal. We may elect not to renew this policy. We may do so by delivering to the person named on the Declarations at the mailing address shown in the Declarations, written notice at least 45 days before the expiration date of this policy. Proof of mailing shall be sufficient proof of notice.

If this policy is written for a period of less than one year, we agree not to refuse to renew except at the end of an annual period commencing with the original or renewal effective date.

All other provisions of this policy apply.

WORKERS' COMPENSATION – CALIFORNIA
Residence Employees

We agree, with respect to residence employees:

Under Coverage I

To pay when due all benefits required of an insured by the California Workers' Compensation Law; and

Under Coverage II

To pay on behalf of an insured all damages for which the insured is legally liable because of bodily injury sustained by a residence employee. The bodily injury must be caused by accident or disease and arise out of and in the course of employment by the insured while:

a. in the United States of America, its territories or possessions, or Canada, or

b. temporarily elsewhere if the residence employee is a citizen or resident of the United States or Canada.

Coverage II does not apply to any suit brought in or judgment rendered by any court outside the United States of America, its territories and possessions, or Canada, or to any action on such judgment.

Who is Covered

A residence employee is covered if during the 90 calendar days immediately before the date of injury the employee has:

a. actually been engaged in such employment by the insured for no less than 52 hours, and

b. earned no less than one hundred dollars ($100) in wages.

Application of Coverage

This insurance applies only to bodily injury which occurs during the policy period. If the bodily injury is a disease, it must be caused or aggravated by the conditions of the residence employee's employment by the insured.

Policy Provisions

This insurance is subject to all the provisions of this endorsement and the following provisions of this policy:

a. Under Section I and II – Conditions:
   4. Waiver or Change of Policy Provisions.
   5. Cancellation.
   7. Assignment.
   8. Subrogation.

b. Under Section II – Conditions:
   3. Duties After Loss.
   6. Suit Against Us.

c. Our agreement to defend the insured as provided under Coverage E – Personal Liability.

d. Under Section II – Additional Coverages:

1. Claim Expenses.

2. First Aid Expenses.

e. The definition of "bodily injury", "business", "insured" and "residence employee".

Additional Provisions Applicable to Coverage I

The following provisions are applicable to Coverage I:

a. We shall be directly and primarily liable to any residence employee of an insured entitled to the benefits of the California Workers' Compensation Law.

b. As between the residence employee and us, notice to or knowledge of the occurrence of the injury on the part of an insured will be deemed notice or knowledge on our part.

c. The jurisdiction of an insured will, for the purpose of the law imposing liability for compensation, be our jurisdiction.

d. We will be subject to the orders, findings, decisions or awards rendered against an insured, under the provisions of the law imposing liability for compensation, subject to the provisions, conditions and limitations of this policy. This policy shall govern as between an insured and us as to payments by either in discharge of an insured's liability for compensation.

e. The residence employee has a first lien upon any amount which we owe you on account of this insurance. In case of your legal incapacity or inability to receive the money and pay it to the residence employees, we will pay it directly to the residence employee. Your obligation to the residence employee will be discharged to the extent of such payment.

Limits of Liability Coverage II

Our total limit of liability will not exceed $100,000 for all damages because of bodily injury:

a. sustained by one or more residence employees in any one accident or

b. caused by disease and sustained by a residence employee.

Our total limit of liability will not exceed $500,000 for all damages arising out of bodily injury by disease regardless of the number of residence employees who sustain bodily injury by disease.

Other Insurance

This Insurance does not apply to any loss to which other valid and collectible Workers' Compensation or Employers' Liability Insurance applies.

Conformity to Statute

Terms of this insurance which are in conflict with the California Workers' Compensation Law are amended to conform to that law.

Exclusions

This policy does not apply:

a. to liability for additional compensation imposed on an insured under Sections 4553 and 4557. Division IV, Labor Code of the State of California, because of the serious and willful misconduct of an insured, or because of bodily injury to an employee under 16

years of age and illegally employed at the time of injury;

b. to liability for bodily injury arising out of business pursuits of an insured.

c. Under Coverage II:

1. to liability assumed by the insured under any contract or agreement.

2. to bodily injury by disease unless a written claim is made or suit brought against the insured within 36 months after the end of the policy period.

3. to any obligation under a workers' compensation, unemployment or disability benefits law or any similar law.

All other provisions of this policy apply.

PREMISES ALARM OR FIRE PROTECTION SYSTEM

For a premium credit, we acknowledge the installation of an alarm system or automatic sprinkler system approved by us on the residence premises. You agree to maintain this system in working order and to notify us promptly of any change made to the system or if it is removed.

Includes copyright material of Insurance Services Office with its permission.

REPLACEMENT COST COVERAGE – PERSONAL PROPERTY

For an additional premium, we will settle losses to covered property at full replacement cost without deduction for depreciation, subject to the provisions of this endorsement.

DEDUCTIBLE

The deductible shown on the Declarations Page applies.

PROPERTY COVERED

- Personal property covered in Coverage C, except personal property stated in Property Not Eligible;
- If covered in this policy: awnings, carpeting, household appliances, outdoor antennas and outdoor equipment, whether or not attached to buildings.

PROPERTY NOT ELIGIBLE

The following items are not eligible for Replacement Cost Settlement:

- items of rarity or antiquity that cannot be replaced;
- articles whose age or history contributes substantially to their value. These include, but are not limited to, memorabilia, souvenirs and collectors' items.
- motorized golf carts and their equipment and accessories.

Any loss to this property will be settled as described in Loss Settlement, item b below.

LOSS SETTLEMENT

SECTION I – CONDITIONS, item 3. Loss Settlement does not apply to property covered by this endorsement.

a. For property that is covered by this endorsement, it is our option to:

(1) replace, or pay you our cost to replace the property with new property of like kind and quality without deduction for depreciation, or

(2) pay you the cost to repair or restore the property to the condition it was in just before the loss.

If you do not wish to have the property replaced, repaired or restored, we will pay you the smaller of:

(3) our cost to replace the property without deduction for depreciation, or

(4) the cost to repair or restore the property to the condition it was in just before the loss.

When the cost to repair or replace is more than $500, we will pay no more than actual cash value until repair or replacement is completed.

You may make a claim for loss on an actual cash value basis and then make claim within 180 days after the loss for any additional liability under the terms of this endorsement.

b. For property that is not eligible for replacement cost settlement, it is our option to:

(1) pay you the actual cash value; or

(2) replace, or to pay you our cost to replace the property with property of like kind, quality and condition; or

(3) pay you the cost to repair or restore the property to the condition it was in just before the loss.

We will not pay more than the Limit of Liability that applies to Coverage C. Nor will we pay more than any Special Limits of Liability that apply as stated in the policy to which this endorsement is attached.

REPLACEMENT COST DEFINED

Replacement Cost means the cost, at the time of loss, of a new item identical to the one damaged, destroyed or stolen. If an identical item is no longer manufactured or cannot be obtained, replacement cost will be the cost of a new item which is:

- similar to the insured article, and
- of like quality and usefulness.

All other provisions of this policy apply.

ADJUSTED BUILDING COST ENDORSEMENT

It is agreed that the limit for SECTION I. Coverage A – Dwelling, shown in the Declarations of this policy, will be adjusted at each policy renewal. This adjustment will reflect the rate of change in the Boeckh Building Cost Index Numbers published by the Boeckh Division of American Appraisal Company, Inc. The resulting limit will be rounded to the nearest $100.

SECTION I. Coverages B (Other Structures), C (Personal Property) and D (Loss of Use) will also be adjusted. The

rules then in use by us will determine the new limits for these coverages.

These limits will not be reduced without your consent.

You have the right to refuse any resulting change in limits. You must do so in writing before the effective date of such change. If you do reject the new limits, we will delete this endorsement from your policy.

We have the right to change to another cost index as of any renewal date. We will give you at least 30 days prior written notice if we do this. Such change must apply to all similar policies issued by us.

All other provisions of this policy apply.

COMPLAINT NOTICE

SHOULD ANY DISPUTE ARISE ABOUT YOUR PREMIUM OR ABOUT A CLAIM THAT YOU HAVE FILED, WRITE OR CALL US.

IF THE PROBLEM CANNOT BE RESOLVED, YOU MAY WRITE OR CALL THE:

CALIFORNIA DEPARTMENT OF INSURANCE
CONSUMER SERVICES BUREAU
600 SOUTH COMMONWEALTH
LOS ANGELES, CALIFORNIA 90005

TELEPHONE: 1-800-233-9045

NOTICE OF INFORMATION PRACTICES

When you applied for insurance with USAA, USAA Casualty Insurance company, or USAA General Indemnity Company, you entrusted us with some personal

information about yourself. This notice briefly describes our practices regarding such information including how we gather it, how we protect it, and how you can help ensure its accuracy.

THE COLLECTION OF INFORMATION

We must obtain certain information about an insured in order to properly evaluate and rate each risk. In most cases, the application you complete gives us all the information we need to evaluate you or your property for insurance. Should we need additional information or want to verify information you have given us, we will contact you, either by phone or mail.

In some insurance transactions, we may not be able to get all the information we need directly from you. In that case, we may obtain information from outside sources. For example, with auto insurance, we may obtain a record of accidents, violations and convictions from your state motor vehicle department. With property insurance, on homes or boats for example, we may ask an independent agency to prepare a report on that property concerning its value and condition.

THE DISCLOSURE OF INFORMATION

Information about you is kept in our records. We will refer to and use that information for purposes of issuing and servicing insurance policies and settling claims. We treat information about you as confidential, but in certain circumstances may disclose the information to others without your authorization. For example, information

about you may be exchanged with our claims adjusters who become involved in the settlement of a claim.

HOW YOU CAN GAIN ACCESS TO INFORMATION

You have a general right of access to the information about you in our records. You also have the right to request that we correct, amend or delete any information which is not accurate. Upon request, we will provide you with a more detailed notice of our collection, disclosure and policy access practices.

IMPORTANT NOTICE – CALIFORNIA WORKERS' COMPENSATION

Under California Law, you as the owner or occupant of a California residence have the responsibility of providing workers' compensation benefits for people you hire to do work around your home such as cleaning help, gardeners, babysitters, etc. if they worked for you at least 52 hours and you paid them wages of at least $100 during the 90 days preceding the date of any injury.

Your policy automatically provides Workers' Compensation coverage for occasional or part-time residence employees who meet the above eligibility requirements. If the occasional or part-time employee works less than 20 hours per week, there is no additional premium charged.

Residence employees (working 20 hours or more per week and more than 10 days in a period of 90 consecutive days) are considered full-time employees, and workers' Compensation coverage must be added to your policy.

The premium charge for this coverage will be based on the number of full-time residence employees and the length of employment.

FAILURE TO REPORT FULL-TIME EMPLOYEES COULD IMPAIR YOUR PROTECTION.

If you have any full-time residence employees not previously reported to us, please complete the lower portion of this form and return it within thirty (30) days so that your exposure under the Workers' Compensation Law can be fully protected. If you currently do not have any full-time residence employees, but acquire one in the future, please let us know.

Full Time Inservants

(one whose duties are primarily inside the house and works 20 hours or more per week, expected to work more than 10 days in a period of 90 consecutive days.

Example: Cook, Maid, Babysitter)

	Type of Work	Date Hired	Date Left Employment
1.			
2.			
3.			

Full Time Outservants

(one whose duties are primarily outside the house and works 20 hours or more per week, expected to work more than 10 days in a period of 90 consecutive days.

Example: Gardener)

	Type of Work	Date Hired	Date Left Employment
1.			
2.			
3.			

Name (Please Print) USAA Number Policy Number

Address

Signature Date

STATE PREMIUM SURCHARGE

Companies writing property and casualty insurance business in your state are required to participate in the Insurance Guaranty Association. If a company is unable to discharge its obligations, due to insolvency, the association will stand by the company's insurance contracts and settle its unpaid claims. To cover these losses, the association assesses insurers an amount equal to their fair share of losses during the previous year.

State law requires all companies to surcharge policies to recover these assessments. The State Premium Surcharge,

reflected on your policy declarations and billing statement, is based on our share of the association's assessment. This is not an increase in your rates. The funds are collected by USAA and remitted to your state guaranty association for its continued operation.

/s/ James A. Patterson
JAMES A. PATTERSON
Senior Vice President
Property & Casualty Operations

PAUL R. FINE, ESQ.
DANIELS, BARATTA & FINE
1801 Century Park East, 9th Floor
Los Angeles, California 90067
(213) 556-7909

Attorneys for Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendants.	CASE NO. 91 3615 JSL (GHKX) NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION; MEMORANDUM OF POINTS AND AUTHORITIES Date: September 3, 1991 Time: 1:00 p.m. Courtroom 4 (Filed July 29, 1991) Federal Rules of Civil Procedure Rule 12(b)(1)

TO PLAINTIFFS LAUGHLIN E. WATERS AND VOULA D. WATERS AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on September 3, 1991, at 1:00 p.m. or as soon thereafter as the matter may be heard in Courtroom 4 located at 312 North Spring Street, Los Angeles, California, defendant UNITED SERVICES AUTOMOBILE ASSOCIATION (hereinafter "USAA") will move the Court for an Order dismissing the instant action pursuant to *Federal Rules of Civil Procedure* Rule 12(b)(1).

This motion will be made on the grounds that this court lacks subject matter jurisdiction to hear this matter as there is a lack of diversity between the parties.

Said motion will be based on this notice, the Memorandum of Points and Authorities attached hereto, the Affidavit of Thomas J. Corridan, all documents on file herein, and on such other oral and documentary evidence as may be presented at the time of the hearing on this matter.

DATED: July 26, 1991

DANIELS, BARATTA & FINE

By /s/ Paul R. Fine
PAUL R. FINE
Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE ASSOCIATION

MEMORANDUM OF POINTS AND AUTHORITIES

I.

PRELIMINARY STATEMENT

This is an action for breach of the duty of good faith and fair dealing arising out of an insurance contract. Plaintiffs allege diversity jurisdiction based on the contention

that they are citizens of the State of California and that defendant UNITED SERVICES AUTOMOBILE ASSOCIATION (hereinafter "USAA") is a citizen only of the State of Texas. As discussed below, USAA is an unincorporated association with members residing in the State of California and, accordingly, is also considered a citizen of the State of California. Thus, diversity jurisdiction does not exist.

II.

LEGAL AUTHORITY

Pursuant to 28 U.S.C. Section 1332(a), this Court may only exercise diversity jurisdiction when the parties are citizens of different states. *Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L.Ed 435 (1806).

> " 'For purposes of diversity jurisdiction, the citizenship of an unincorporated association is the citizenship of the individual members of the association.' " *Tuck v. United Services Automobile Association*, 859 F.2d 842, 844 (10th Cir. 1988) *citing Jett v. Phillips & Assoc.*, 439 F.2d 987, 990 (10th Cir. 1971); *see United States Steel Workers of America v. Bouligny, Inc.*, 382 U.S. 145, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965); *see generally* 138 C. Wright, A. Miller, E. Cooper, *Federal Practice & Procedure* (2d ed. 1984 Section 3630.

III.

PLAINTIFF HAS THE BURDEN OF PROOF TO SHOW JURISDICTION

As stated in *Flynt Distributing Co., Inc. v. Harvey*, 734 F.2d 1389 13th Cir. 1984):

"The party seeking to invoke jurisdiction has the burden of establishing that jurisdiction exists. . . . If there is a dispute about the jurisdictional facts, the plaintiff will have to establish them by a preponderance of the evidence at a preliminary hearing or at trial. [Citations omitted.]" *Id.* at 1392.

IV.

USAA IS A CITIZEN OF THE STATE OF CALIFORNIA

USAA is an unincorporated association and accordingly, all members of the association must be diverse from the opposing party. *Rockwall International Credit Corp. v. U.S. Aircraft Insurance Group*, 823 F.2d 302 (9th Cir. 1987). As clearly shown in the Affidavit of Thomas J. Corridan, attached hereto as Exhibit 1, USAA is an unincorporated association that has over 186,556 members in the State of California.

The case of *Tuck* is directly on point. In *Tuck*, the identical question against the identical defendant was at issue. The court in *Tuck* found that since plaintiffs were citizens of Oklahoma and since USAA had members who were citizens of Oklahoma, diversity jurisdiction did not lie. *Id.* at 844-846.

V.

CONCLUSION

Accordingly, as this action contains plaintiffs and defendants who are citizens of the State of California, diversity

jurisdiction does not lie and this matter must be dismissed.

DATED: July 21, 1991

Respectfully submitted,

DANIELS, BARATTA & FINE

By /s/ Paul R. Fine
PAUL R. FINE
Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE ASSOCIATION

STATE OF TEXAS)
) ss
COUNTY OF BEYAR)

UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS	)	
vs	)	Case No. 91 3615JSL (GH KY)
UNITED SERVICES AUTOMOBILE ASSOCIATION	)	

AFFIDAVIT

Before me, the undesigned authority, on this personally appeared, THOMAS J. CORRIDAN, known to me, as being first duly sworn, deposes and states the following, to wit:

I am THOMAS J. CORRIDAN of legal age, residing in the State of Texas. I am employed by UNITED SERVICES AUTOMOBILE ASSOCIATION, incorrectly sued herein as UNITED SERVICE AUTOMOBILE INSURANCE COMPANY (USAA), as Associate Claims Counsel.

In the above-stated capacity, I affirm that UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA) is a reciprocal inter-insurance exchange, domicile in Texas and licensed under Capter [sic] 19 of the Texas Insurance Code. USAA is an unincorporated association licensed to do business as a property/casualty insurer in all fifty states, as well as certain foreign locations. USAA currently has over 186,556 members domiciled in the State of California, including member Laughlin E. Waters.

/s/ Thomas J. Corridan
THOMAS J. CORRIDAN
ASSOCIATE CLAIMS COUNSEL
UNITED SERVICES
AUTOMOBILE ASSOCIATION

Subscribed and sworn to (illegible) before this 25th day of July , 1991.

/s/ Illegible
Notary Public

STATE OF TEXAS)
) ss
COUNTY OF BEYAR)

UNITED STATES DISTRICT COURT
DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS	)	
vs	)	Case No. 91 3615JSL (GH KY)
UNITED SERVICES AUTOMOBILE ASSOCIATION	)	

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In the above-stated capacity, I affirm that UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA) is a reciprocal inter-insurance exchange, domicile in Texas and licensed under Capter [sic] 19 of the Texas Insurance Code. USAA is an unincorporated association licensed to do business as a property/casualty insurer in all fifty

states, as well as certain foreign locations. USAA currently has over 186,556 members domiciled in the State of California, including member Laughlin E. Waters.

/s/ Thomas J. Corridan
THOMAS J. CORRIDAN
ASSOCIATE CLAIMS COUNSEL
UNITED SERVICES
AUTOMOBILE ASSOCIATION

Subscribed and sworn to (illegible) before this 25th day of July , 1991.

/s/ Illegible
Notary Public

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L. TYSCH, #128389
Members of the Firm
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600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 WFN OPPOSITION TO MOTION TO DISMISS REQUEST FOR SANCTIONS MEMORANDUM OF POINTS AND AUTHORITIES Date: November 8, 1991 Time: 8:30 a.m. Room: To be assigned (Judge Wm. Fremming Nielsen)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Plaintiffs LAUGHLIN E. WATERS and VOULA D. WATERS hereby oppose the Motion to dismiss of defendant UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") on the grounds that diversity jurisdiction does exist.

PLEASE TAKE NOTICE THAT PLAINTIFFS FURTHER MOVE THIS COURT FOR AN AWARD OF SANCTIONS AGAINST USAA under F.R.C.P. Rule 11 on the grounds that USAA has engaged in a systematic, self-serving abuse of Federal Court processes by fraudulent means, including the signing of conflicting documentation under oath, for the purpose of manipulating Federal court jurisdiction.

Plaintiffs' opposition and request for sanctions is based on this Opposition, the attached Memorandum of Points and Authorities, the concurrently-filed Addendum, the concurrently-filed Declaration of Patrick Carr, all papers, pleadings and records on file in this action and on such other and further argument and evidence as may be presented.

Dated this 15 day of October, 1991 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: /s/ William M. Shernoff
WILLIAM M. SHERNOFF
Attorneys for Plaintiff

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MEMORANDUM OF POINTS AND AUTHORITIES

1.

INTRODUCTION

This memorandum vividly demonstrates that United Services Automobile Association, one of the largest insurance companies in the world (herein "USAA"), has engaged in a massive, widespread and fraudulent scheme to mislead the Federal courts and to manipulate federal court jurisdiction to suit its own purposes. The magnitude, arrogance and self-serving abuse practiced by USAA over a prolonged period of time is a matter which deserves the most serious judicial consideration and requires the severest of sanctions sufficient to punish USAA and in order to deter future abuse by it and others.

The means to carry out its outrageous activity have been false and fraudulent misrepresentations to courts and litigants, both under oath and in USAA's pleadings. USAA's purpose in engaging in this longstanding fraudulent activity has been to invoke federal court jurisdiction wherever USAA deemed it to be to its advantage to be in Federal court and to defeat Federal court jurisdiction

wherever it was to USAA's advantage to be in state court. For example, USAA would bring actions in, or remove actions to, Federal court on the basis of diversity of jurisdiction. Then, if the case "went bad" for it, USAA would assert a purported lack of diversity jurisdiction as a means for escaping an adverse judgment and would thereby discourage its opponent from continuing litigation. Conversely, if the case went well for USAA, no mention of the purported lack of subject matter jurisdiction would be raised by it and the final judgment entered to its benefit would remain secure.

The centerpiece of USAA's nefarious scheme is the legal status of USAA. If it is truly a traditional unincorporated association, as it has claimed from one side of its mouth, then USAA argues there is no diversity jurisdiction since obviously some of its millions of policyholders reside in virtually every state.[1] If its status is corporate, as it has acknowledged from the other side of its mouth, then diversity of jurisdiction would lie under current diversity case law.

In this case, USAA seeks to avoid federal court jurisdiction because it is obviously in USAA's best interest to be out of Federal court. The plaintiffs in this case are a well-respected, senior district court federal judge and his wife who seek fire insurance benefits from USAA after

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[1] Attached as Exhibit II to the concurrrently-filed Addendum is a true and correct copy of *National Underwriter Profiles*, 1991, Property/Casualty Insurers, Financial and Underwriting Performance Results, p. 694. As reflected there, USAA is authorized to write insurance in every state of the union, Guam, Puerto Rico, D.C. and the Virgin Islands.

their house was devastated by fire on December 17, 1990. The Waters claim serious violations of the duty of good faith owed to them by USAA, which eventually caused multiple hospitalizations of Judge Waters' wife for anxiety, stress and high blood pressure.

It is truly ironic that USAA cites the case of *Tuck v. USAA*, 859 F.2d 842 (1988), in support of its motion to dismiss in this case. It was in *Tuck* that the scope and pervasiveness of USAA's manipulation and abuse of litigants in federal courts was first uncovered.

Even more ironic is that the *Tuck* decision, which is relied upon by USAA in this motion, has been castigated and condemned by USAA itself. In its writ of certiorari to the United States Supreme Court, USAA said that the *Tuck* decision exceeds the Federal court's jurisdictional bounds and is an illegitimate exercise of power because the *Tuck* court gave remand instructions and suggested sanctions.[2]

Indeed, the *Tuck* decision itself is a prime example of USAA's misdeeds. The decision was based upon misleading information provided to the court and the making of knowingly-erroneous arguments to the court, all for the purpose of escaping a judgment. USAA failed to acknowledge before the *Tuck* court, as it had before other Federal courts, that it is a reciprocal interinsurance exchange, and therefore is a corporate creature for diversity jurisdiction purposes. This very vital information and these critically-important arguments had been used previously by USAA to obtain Federal court jurisdiction

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[2] See Exhibit "J" to Addendum

when it suited USAA to have such jurisdiction, as will be shown below.

Furthermore, this accurate information, which revealed the proper effect of USAA's status as a reciprocal interinsurance exchange has been withheld from this Court as well. Although the affidavit submitted in support of its motion to dismiss mentions in passing that USAA is a reciprocal interinsurance exchange, USAA's entire points and authorities deals with the diversity issue as it relates to an unincorporated association. USAA, however, completely fails to provide the legal argument, which USAA itself has relied upon in other cases, that such an interinsurance exchange is akin to a corporation for purposes of diversity jurisdiction.

In *Tuck*, there was a Federal court judgment rendered against USAA in the sum of $900,000.[3] Only after the entire trial, after judgment was rendered and only upon appeal did USAA bring a motion to dismiss on the basis of the lack of subject matter jurisdiction. It was in the *Tuck* case that USAA's jurisdictional hopscotching was first noticed and berated by the Tenth Circuit Court of Appeals. Upon remand, and the suggestion of a sanctions motion, a more full and complete investigation of USAA's past activities was conducted. After the investigation revealed USAA's massive and widespread scheme to manipulate the court system, a sanctions motion was filed in the trial court seeking $1 million in sanctions. This sanctions motion was pending in the *Tuck* case when

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[3] That judgment was ultimately reduced by the trial court to $775,000 in response to USAA's motion for new trial.

USAA rushed to settle the case by payment of the full judgment in order to avoid having its dishonorable and disrespectful conduct spread upon the record and in order to avoid facing sanctions for its fraudulent activity upon the Federal courts.

As set forth below, both in the Memorandum of Points and Authorities and the addenum filed concurrently, there are *at least 172 other known cases*[4] in which USAA has perpetuated a fraud upon litigants and the Federal courts in order to manipulate jurisdiction for its own purposes. More startling, USAA has continued this conduct in some cases even since the *Tuck* decision in which the Tenth Circuit berated USAA for its unseemly conduct. USAA's conduct should not go unchecked or unpunished.

In support of its motion to dismiss in this case, USAA submits an affidavit stating that it is an unincorporated association with policyholders residing in California. However, this affidavit directly conflicts with its allegations in pleadings, many verified, and other affidavits in other Federal cases, in which USAA swore, and persuasively argued, that it was a corporate citizen of the State of Texas for diversity purposes.

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[4] See Addendum, pp 1-34.

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USAA HAS ENGAGED IN A DELIBERATE SCHEME TO FRAUDULENTLY MANIPULATE FEDERAL COURT JURISDICTION TO THE DETRIMENT OF LITIGANTS AND THE FEDERAL COURT, AT BOTH THE TRIAL COURT LEVEL AND APPELLATE COURT LEVEL.

In *Tuck*, the very case cited by USAA in this motion to dismiss, USAA waited until after a judgment in favor of the plaintiffs for $900,000, later reduced to $775,000 by the trial court, was rendered before raising the jurisdictional issue. The most striking evidence of USAA's outrageous conduct is found in several cases on appeal in other circuits at the time USAA was arguing in *Tuck* that there was no federal court jurisdiction.

Incredibly, after USAA argued no diversity jurisdiction in its appeal in *Tuck*, USAA appeared at least three times before a Court of Appeal in sister circuits under exactly the same circumstances, only in those cases USAA did not seek to dismiss those cases for lack of subject matter jurisdiction because USAA would stand to lose if it did so.

The decision of the Tenth Circuit Court in *Tuck* was handed down on October 14, 1988. Two weeks later, on October 31, 1988, USAA filed a complaint in the U.S. District Court for the Northern District of Ohio as subrogee of its insured, seeking damages for negligence, master-servant vicarious liability, and indemnity.[5] In its opening paragraph, USAA stated that "United Services Automobile Associaton ("USAA") is a *corporation* organized pursuant to the laws of the State of Texas with its

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[5] *USAA v. Barger*, Addendum, p. 1: Exhibit "A", Case #3

principal place of business located in San Antonio, Texas". (Emphasis added.) In paragraph six of its Complaint, USAA states that, "Jurisdiction of this Court is founded on Title 28, U.S.C. Section 1332 and 2201, Plaintiff and defendant not being citizens of the same state . . . "[6]

Thus, only two weeks after prevailing upon the *Tenth* Circuit to adopt the *Second* Circuit's holding in *Baer* that USAA is an unincorporated association whose citizenship is that of all of its members, USAA shamelessly proceeded to invoke the jurisdiction of a federal court in the *Sixth* Circuit, acknowledging it is a Texas corporation whose citizenship is diverse from that of the defendant, a resident of Pennsylvania. At the same time it sought to vacate a judgment for $775,000.00 in one circuit for lack of subject matter jurisdiction, it filed suit to *obtain* a judgment for $300,000.00 in another on the basis of the very same jurisdiction.

In another case, USAA filed suit for declaratory judgment in the United States District Court for the Eastern District of Pennsylvania, December 4, 1987, eighteen month *after* filing its Suggestion of Lack of Subject Matter Jurisdiction and Motion to Dismiss in *Tuck*, which was filed April 15, 1986.[7] Again, as in *Barger, supra* USAA made contradictory jurisdictional allegations.

In paragraph two of the Complaint for Declaratory Judgment in that case, USAA alleged that, "The plaintiff,

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[6] See Addendum, pp. 53-4: Exhibit "I" – USAA's Complaint in *USAA v. Barger*, filed 10/31/88.

[7] *USAA V. Evangelista*, Addendum: Exhibit "A" –Case #12.

United Services Automobile Association (USAA), is incorporated under the laws of the State of Texas, with its principal place of business in San Antonio, Texas". Paragraph four alleges that, "The court has jurisdiction by virtue of 28 U.S.C., Section 1332". Paragraph five then claims that, "An actual controversy of justiciable nature exists between the plaintiff and defendant, who are citizens of different states . . . " Such statements are utterly irreconcilable with the exact opposite assertions in its Motion pending before this Court. Nevertheless, *the Complaint was verified as "true and correct" by its counsel,* Mr. Bruce S. Pancio.[8]

In *Evangelista,* USAA's Motion for Summary Judgment was granted on October 13, 1988, just as the *Tuck* decision was handed down. *USAA v. Evangelista,* 698 F.Supp. 85 (E.D. Pa. 1988). Evangelista then appealed on November 1, 1988. That appeal was pending before the United States Court of Appeals for the Third Circuit *after* the Tenth Circuit court concluded, at USAA's instigation, that diversity jurisdiction did not exist in *Tuck.* USAA failed to file any papers suggesting any lack of subject matter jurisdiction with the Third Circuit. The Court of Appeals for the Third Circuit, ignorant of USAA's jurisdictional manipulation, handed down its decision affirming the trial court's judgment in USAA's favor on March 10, 1989, five months *after* the decision in *Tuck.*

In a more startling case, USAA practiced its systematic district court manipulation on the Ninth Circuit Court.

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[8] See Addendum, pp. 63-5: Exhibit "M" – USAA's Complaint in *USAA v. Evangelista,* Case #12, filed 12/4/87.

That case was originally filed by USAA in the District of Hawaii on April 3, 1984, shortly before the jury verdict in *Tuck*.[9] Again, USAA made jurisdictional allegations in its Complaint acknowledged its status as a Texas corporation for diversity purposes.

Paragraph two of USAA's Complaint in the *HIG* case states that, "Plaintiff is a corporate citizen of Texas, Incorporated in and having its principal place of business in the State of Texas". Paragraph three then states that, "Defendant Hawaiian Insurance Company and Guaranty Company, Ltd. ("HIG") is a corporate citizen of Hawaii, incorporated in and having its principal place or places of business in states other than the State of Texas".

Paragraph four makes the same allegation of Travelers Insurance Companies, "A corporate citizen of Connecticut". Conspicuous by its absence is any allusion to the unincorporated association status it alleged in *Tuck* and in this case. In paragraph eight, USAA concludes that, "This Court has jurisdiction because of diversity of citizenship of the parties".[10]

The *HIG* case, in which USAA itself invoked Federal Court jurisdiction under the diversity rules, continued for several years. On October 6, 1987, while USAA's Motion to Dismiss was pending in *Tuck*, USAA filed a Scheduling Conference Statement in *HIG* affirming diversity jurisdiction.[11] USAA filed a motion for summary judgment on

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[9] *USAA v. Hawaiian Insurance and Guaranty Co., Ltd.*, Addendum, P. 2: Exhibit "A" – Case #7.

[10] See Addendum, pp. 66-7: Exhibit "N-1": – USAA's Complaint in *USAA v. HIG*, Case No. 7, filed 4/3/84.

[11] Addendum, p. 69: Exhibit "N-2".

February 29, 1988, which was granted and which awarded USAA a $300,000 judgment. This came long after USAA had already sought to dismiss *Tuck* for lack of diversity jurisdiction in order to avoid a judgment. Thus, USAA was awarded a judgment in excess of $300,000.00 by a Federal Court at the very same time it was seeking to vacate a judgment in *Tuck* for that very same lack of jurisdiction.[12]

HIG appealed the order granting summary judgment in USAA's favor to the Ninth Circuit. While that case was on appeal to the Ninth Circuit, the Tenth Circuit Court rendered its decision in *Tuck*. In hindsight, it should come as no surprise that USAA did nothing to dismiss the action in *HIG* for lack of jurisdiction. On the contrary, USAA did everything it could to maintain its judgment in *HIG* and, in fact, the judgment of the trial court was affirmed on November 21, 1989.[13] Thus USAA secured its Federal court judgment a full eight months after its petition for writ of certiorari in *Tuck* was denied and that case became final.

It is impossible to escape a sense of outrage at the obvious fraudulent nature of USAA's actions in these three appeals. In each case it was USAA, which, as plaintiff, invoked the jurisdiction of the federal court, acknowledging its status as a Texas corporation. In each case, USAA either itself appealed, or took part in an

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[12] Attached as Exhibit JJ to the Addendum is a chronology of the relevant interrelationship of the dates of the other cited cases to the events in the *Tuck* case.

[13] See Addendum, pp. 2, Case No. 7.

appeal, after the *Tuck* decision, and affirmatively asserted Federal court jurisdiction.

The naked duplicity of USAA in this matter is strikingly demonstrated by the case of *Pridgen v. USAA*[14], from the middle District of Georgia. There USAA was sued in state court for its bad faith refusal to pay personal injury protection benefits to a minor child severely injured in an accident. USAA then filed a Petition for Removal in federal court on November 14, 1984, alleging jurisdiction under U.S.C.A. section 1332 because "Petitioners (sic) [USAA] are residents and citizens of the State of Texas". *This Petition was verified as "true and correct" by USAA's attorney.*[15]

In response, Pridgen moved to remand the case to state court on the grounds that "at the time of the filing of defendant's petition for removal of the action to this Court, both plaintiff and defendant were citizens of the State of Georgia," and that, therefore, the federal court was "without original and removal jurisdiction over the above-entitled action".[16]

It is fascinating, to read USAA's response, which proved to be so persuasive that *Pridgen's motion to remand was denied.* In its "Brief in Opposition to Plaintiff's Motion

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[14] Addendum, p. 16: Exhibit "A" – Case #72

[15] See Addendum, pp. 74-5: Exhibit "P-1".

[16] See Addendum, pp. 76-7: Exhibit "P-2" – Plaintiff's Motion to Remand and Brief in Support of *Pridgen v. USAA*, Case No. 72, filed 11/20/84.

to Remand"[17], USAA admitted it is a reciprocal interinsurance exchange, and, further, acknowledged that "for purpose of 28 U.S.C. section 1332, USAA should be considered a citizen of Texas", a position exactly opposite to that in *Tuck* and in this case.

USAA went on to point out that "[u]nder Texas law, such exchanges are similar, if not identical to, corporations."[18] USAA cites the case of *Wilson v. Marshall*, 218 S.W.2d 345, 346 (1949), in which the Court of Civil Appeals of Texas stated as follows:

> The subscribers at a reciprocal exchange are not only policyholders thereat[sic] and as such entitled to the protection afforded by the policies and required to pay the premiums stipulated in the policies; but they also own the insurance business just as stockholders own their corporation.

Additional "indicia" of its corporate status, USAA told the *Pridgen* court, is the fact that it is the parent company in an insurance holding company system regulated by the Texas Insurance Code and owns all the stock of several subsidiary corporations. "Also," the Brief went on, "like a corporation, USAA is controlled by a board of directors, has officers, and is governed by a set of bylaws."[19] USAA then made the following statement:

> An examination of the Texas statutes pertaining to reciprocal interinsurance exchanges indicates

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[17] See Addendum, p. 81-2: Exhibit "P-3", filed 11/29/84, at 2.

[18] Addendum, p. 83: Exhibit "H", at 6.

[19] Addendum, p. 84: Exhibit "P-3" at 7.

> that such exchanges may be corporations. In fact, such an examination reveals that the term "reciprocal exchange" is less a description of the type of business organization than it is a description of the type of insurance arrangement.[20]

Moreover, USAA continued, "reciprocal insurance exchanges are subject virtually to the same regulatory scheme as corporations". Additionally, USAA is the parent company of a number of subsidiary companies and regardless of which subsidiary one is in fact dealing with, all communications are directed to the same corporate headquarters in San Antonio, Texas. Therefore, so we are told, "one can conclude that the parent and subsidiaries are really one and the same and should be treated as one corporation". This argument is rather like piercing the corporate veil, only in reverse. USAA would assume the corporate character of its alter egos, when it suits USAA to do so. "Clearly", the Brief concluded, "USAA is a corporate entity in everything but name."[21]

USAA was then faced with the task of refuting the decision in *Baer v. USAA*, 503 F.2d 393 (2nd Cir. 1974), which reached the opposite conclusion. In that case, USAA argued, "The parties were unable to bring most of the facts relied upon herein to the Court's attention". Additionally, USAA, went on, "*Baer* was decided in 1974, and, while it may have been a smaller operation then, which more closely resembled a voluntary association,

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[20] Addendum, p. 85: Exhibit "P-3" at 8, (Emphasis added.)

[21] Addendum, p. 85: Exhibit "P-3" at 8.

today it is clearly a huge corporate organization".[22] USAA even cited, as did the plaintiffs in *Tuck*, the case of *USAA v. Glen Falls Insurance Company*, 429 F.Supp. 101, 105 (D. Conn. 1976), which described USAA as a "Texas corporation" and found diversity jurisdiction on that basis.[23]

Finally, USAA argued in *Pridgen* that its principal place of business, as a holding company, is considered to be the location of its "nerve center", *i.e.*, "the location from which the corporation's officers direct, control, and coordinate all activities without regard to location, in the furtherance of the corporate objective", quoting *Lugo Vina v. Pueblo Int'l. Insurance*, 574 F.2d 41, 43 (1st Cir. 1979). USAA then located that point of control quite precisely. "Since all officers operate out of San Antonio, Texas, that is the 'nerve center' and principal place of business of United Services Automobile Association."[24]

The Trial Court in *Pridgen* found USAA's acknowledgment of its corporate status convincing. It denied plaintiff's Motion to Remand in an Order dated December 14, 1984 and invoked federal jurisdiction.[25] If the *Pridgen* case tells us anything, it is that USAA knows no shame.

In line with its pattern of manipulation, USAA actively concealed the legal argument it relied on in

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[22] Addendum, pp. 86-7: Exhibit "P-3" at 9-10.

[23] Addendum, p. 87: Exhibit "P-3" at 10.

[24] Addendum, p. 87-8: Exhibit "P-3", at 10-11.

[25] See Addendum, p. 16, Case #72.

Pridgen regarding its corporate status from this Court. Although the affidavit presented by USAA concedes that USAA is a reciprocal interinsurance exchange, its entire legal argument is based on the assumption that such a reciprocal interinsurance exchange is nothing more than an unincorporated association when, in fact, USAA itself has admitted that such an organization is a corporation for purposes of determining diversity jurisdiction.

Several other appeals are worthy of note. Each case was on appeal while USAA's Motion to Dismiss was pending before the Tenth Circuit in *Tuck*. The Complaint in *Oss v. USAA*[26], was filed on January 11, 1985, in the Western District of Texas, the very district in which USAA is headquartered. Nevertheless, USAA failed to challenge diversity jurisdiction, either in the trial court or on appeal.

In *USAA v. Weappa*, Northern District of Alabama[27], USAA filed a Complaint on February 10, 1986, two months before the Motion to Dismiss in *Tuck*. The Complaint alleges diversity of citizenship as the basis of jurisdiction and prays for a declaratory judgment denying coverage.[28] The Pre-Trial Order, dated August 5, 1986, recites "the admitted diversity of citizenship".[29] The case was tried to the court and resulted in a verdict favorable to USAA on November 5, 1987. Weappa appealed. The Order of the Trial Court was affirmed on August 5, 1988,

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[26] Addendum: Exhibit "A" – Case #61.

[27] Addendum, p. 6: Exhibit "A" – Case #26.

[28] Addendum, p. 72: Exhibit "O-1".

[29] Addendum, p. 73: Exhibit "O-2".

shortly before the decision in *Tuck*. *USAA v. Weappa*, 856 F.2d 198 (5th Cir. 1988). Again, USAA does not hesitate to avail itself of the jurisdiction of one Court of Appeal, in this case that of the Eleventh Circuit, to uphold a judgment favorable to it, while at the same time seeking to vacate an unfavorable judgment in the Tenth Circuit Court of Appeal.

In *Gill v. Rollins Protective Services*, Eastern District of Virginia[30], USAA, the Gills' subrogated homeowners insurer, was added as a real party in interest by Rollins. This case was the subject of not one, but three different appeals. The first appeal was decided November 28, 1983, 722 F.2d 55. The Second appeal, was decided September 26, 1985, held that USAA had a valid right of subrogation, 773 F.2d 592. The third appeal was filed on December 19, 1987, eight months after the Motion to Dismiss in *Tuck*, and was decided on December 23, 1987, a year later, yet at no time did USAA claim before the Court of Appeal for the Fourth Circuit the very same lack of diversity it complained of in the Tenth Circuit. (836 F.2d 194.)

Another marathon case, or group of cases, arising out of the same fatal car wreck, went on appeal three different times. In the first of these cases, *Shine v. USAA*[31], USAA appealed. *Shine v. United Services Automobile Association*, 680 F.2d 1387 (5th Cir. 1982). In the second case arising out of the same collision, *Moore v. USAA*[32], the

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[30] Addendum, p. 38: Exhibit "A" – Case #38.

[31] Addendum: Exhibit "A" – Case #134.

[32] Addendum: Exhibit "A" – Case #58.

plaintiff appealed on January 31, 1986, shortly before the Motion to Dismiss in *Tuck*. The case was decided February 5, 1987. *Moore v. United Services Automobile Association*, 808 F.2d 1147 (5th Cir. 1987). *Moore v. USAA*[33] was appealed twice, first by Moore, November 20, 1985, and second by USAA, July 8, 1986, while its Motion was pending in *Tuck*. The case was decided on June 11, 1987.[34] The issue there was whether USAA had properly removed the case from state court. The Fifth Circuit ruled it had not, stating "Although Moore and USAA clearly are diverse, the bad faith claim is not separate and independent".[35] USAA did nothing to disabuse the Court of Appeal of the notion that "the citizenship of Moore, a Florida resident, is diverse from USAA, a Texas corporation".[36]

Incredibly, at the very time its belated challenge to jurisdiction was pending in *Tuck*, USAA argued *against* the Motion to Remand to state court for lack of jurisdiction in *Moore*.[37] USAA even sought sanctions for Moore's action in resisting summary judgment on the bad faith claim,[38] when it was USAA which should have been sanctioned, in the first place, for removing the case to federal court when it was claiming no Federal Court jurisdiction in *Tuck* and elsewhere. See *S.A. Auto Lube, Inc.*

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[33] Addendum: Exhibit "A" – Case #44.

[34] *Moore v. United Services Automobile Association*, 819 F.2d 101 (5th Cir. 1987).

[35] *Id.*, at 102.

[36] *Id.*

[37] *Id.* at 109.

[38] *Id.*

v. Jiffy Lube Int'l. Inc., 842 F.2d 946 (7th Cir. 1988); *Hewitt v. City of Stanton*, 798 F.2d 1230 (9th Cir. 1986). USAA even went so far as to appeal the denial of the sanctions it requested against Moore. (819 F.2d at 102).

Again, the conduct of USAA in all of these cases is nothing less than reprehensible. During the entire time USAA challenged jurisdiction in *Tuck*, USAA was seeking its own advantage in Federal court on the basis of the very same jurisdiction in other districts and in other circuits. If this conduct is not deserving of the most severe sanctions, nothing is.

USAA has *initiated* at least 71 actions in federal court since the 1974 decision in *Baer v. USAA*, 503 F.2d 393 (2nd Cir. 1974) in which the court held USAA was not subject to federal diversity jurisdiction on the basis of its *alleged* association status.[39] This includes at least 31 cases in which USAA has gone so far as to actually *remove* a case in which it was a defendant from a state court to federal court on the claim of diversity jurisdiction.[40] This is all the more remarkable in light of the fact that when it is to its own advantage, USAA claims to be a citizen of virtually every state of the Union.

Another case, *Stout, et al. v. Hamby and USAA*[41], from the Middle District of Louisiana, was removed by USAA on September 22, 1988, just before the Tenth Circuit's decision in *Tuck*. The removal petition alleged that USAA was "at the time of the filing of the Original Petition

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[39] See Addendum, Exhibit B, pp 35-36; Exhibit C, pp 37-39.

[40] See Addendum, Exhibit B, pp. 35-36.

[41] Addendum, p. 4: Exhibit "A" – Case #4.

herein, and as of the time of the filing of this Petition for Removal, a foreign insurer whose principal place of business and whose citizenship for purposes of diversity is a state other than the State of Louisiana". The Petition further claimed that "(f)ederal subject matter jurisdiction is proper under 28 U.S.C.A. 1441, and venue is proper under 28 U.S.C.A. 1391(a) and was also proper had the Petition originally been brought in United States District Court for the Middle District of Louisiana". This proceeding, the Petition alleged, was therefore removable under 28 U.S.C.A. 1441.[42]

Even more astonishing, if that is possible, are two related cases from the Northern District of Mississippi, removed by USAA on November 19, 1986, seven months *after* moving to dismiss in *Tuck*.[43] In its *verified Petition*, USAA alleges the case to be a "controversy between citizens of different states", identifies itself as a "corporate non-resident [sic] of the State of Texas" which "is not now and was not at the time of the institution of this action nor at any time a citizen or resident corporation of the State of Mississippi".[44] Although in its Response to Request for Admissions, dated June 8, 1988, USAA does state that it is a "reciprocal interinsurance exchange"[45], the Pretrial Order, dated July 7, 1988, and signed by USAA's counsel, recites diversity of citizenship as the basis for jurisdiction.[46]

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[42] See Addendum, pp. 89-91: Exhibit "Q".

[43] *Liles v. USAA*, Addendum, p. 7: Exhibit "A" – Case #30.

[44] Addendum, pp. 92-4: Exhibit "R-1".

[45] Addendum, p. 95: Exhibit "R-2".

[46] Addendum pp. 96-8: Exhibit "R-3".

One can only marvel at the devious ingenuity of USAA. The same procedural ploy used to vacate an unacceptable judgment in one case, is deftly turned into a device to preserve another judgment which suits it. If USAA might do better in state court, it argues one way; if it might do worse, it argues the other.

USAA apparently knows what it is doing when it removes cases to federal court. In only one of the removal cases uncovered did the plaintiff obtain a judgment against USAA. In five cases, judgment was for USAA. The rest were settled or remanded to state court.[47]

These removal cases demonstrate quite convincingly the egregious flaunting of the Federal Courts of which USAA has proven itself more than capable, time after time after time. Not only does USAA invoke the jurisdiction of the federal judiciary whenever it pleases, it at the same time seeks to divest the state court of its jurisdiction as well, all to gain a forum in which USAA feels its interest will be better served.

Second only to these removal cases are those in which USAA is the plaintiff. USAA has been the plaintiff in at least 41 cases since the *Baer* decision.[48] Of these, 17, almost half, were filed, or remained opened, after USAA filed its Motion to Dismiss in *Tuck*.

For example, in *USAA v. Arev*[49], paragraph one of the Complaint alleges that USAA is a "citizen of Texas by

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[47] See Addendum, p. 35: Exhibit "B".

[48] Addendum, Exhibit C.

[49] Addendum: Exhibit "A" – Case #1,.

virtue of its being incorporated under Texas law and by virtue of having its principal place of business in Texas", and paragraph six alleges diversity jurisdiction exists.[50]

On November 18, 1986, seven months after USAA filed its Motion to Dismiss in *Tuck*, it filed a Complaint for declaratory relief to determine it had no duty to defend or indemnify in a case then pending in state court. In *USAA v. Stryker*[51], USAA correctly identified itself as a "reciprocal inter-insurance exchange", and claimed diversity of citizenship.[52] In *USAA v. Krieger*[53], USAA filed another declaratory action on July 25, 1986, which resulted in a judgment for USAA on March 19, 1987.

USAA obtained summary judgment on August 1, 1986, in a declaratory action in the District of Hawaii, *USAA v. Ah Moo*[54]. The Complaint filed on June 4, 1985, alleges that USAA is a Texas corporation and that "every issue of law and fact herein is wholly between citizens of different states",[55] a claim repeated in USAA's Scheduling Conference Statement.[56]

Clearly, USAA does not shrink from seeking the aid of the same federal judiciary it condemns the Waters for turning to. It is only when the forum is disfavored, or the

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[50] Addendum, pp. 115-116: Exhibit "ST".

[51] Addendum, p. 7: Exhibit "A" – Case #31.

[52] Addendum, pp. 117-9: Exhibit "T".

[53] Addendum, p. 12: Exhibit "A" – Case #50.

[54] Addendum, p. 15: Exhibit "A" – Case #67.

[55] Addendum, p. 120-1: Exhibit "U-1".

[56] Addendum, pp. 122-23: Exhibit "U-2".

outcome unacceptable, that USAA claims a "lack of jurisdiction over the subject matter". USAA's selective use of the federal forum has proven nearly as effective in its plaintiff cases as in the cases it removes to federal court. USAA has lost only three: *Barger*, Case #3, which USAA appealed and which was affirmed; *Fuqua*, Case #25, in which USAA continued to contest attorney fees and costs for over a year; and *USAA v. Dubose*[57], Southern District of Mississippi, which USAA appealed, unsuccessfully, to the Fifth Circuit. *United Services Automobile Association v. Dubose*, 606 F.2d 320 (5th Cir. 1979).

There are also numerous cases where, as here, USAA has been sued as Defendant. These cases are less spectacular than the others in that USAA has not actually invoked federal jurisdiction, but has acquiesced in its assertion by the various plaintiffs. Of course, this, too, necessitates a responsive pleading by USAA, signed by its counsel. In many cases USAA filed a counterclaim, cross-claim, or third-party claim as part of its defense strategy. There, too, USAA is and has invoked federal jurisdiction.

There are at least 95 cases in which USAA is a defendant filed after the *Baer* decision was handed down.[58] There are some 38 cases brought against USAA after it moved to dismiss in *Tuck* or which remained open thereafter.[59] In only nine of these did USAA seek a dismissal. In at least 29 cases, USAA permitted itself to be sued

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[57] Addendum, p. 29: Exhibit "A" – Case #135.

[58] See Addendum, Exhibit D, pp. 40-44.

[59] See Addendum, p. 40: Exhibit "D".

without doing what it did in here, i.e., seek to have the suit dismissed because the trial court lacked jurisdiction over the subject matter of the lawsuit.[60]

For example, in *Smith v. USAA*[61], USAA was sued as a Texas corporation, and allowed the litigation to proceed without challenging federal jurisdiction. Of course, the verdict was only for $2,400.00 which may explain USAA's indifference to the dilemma of diversity.

3.

WHERE THERE IS CONFLICTING EVIDENCE AS TO CITIZENSHIP, THIS COURT MAY RESOLVE THE EVIDETIARY DISPUTE AND RULE ON THAT BASIS

USAA submitted, in support of its motion to dismiss, an affidavit that it is an unincorporated association under Texas law. However, as noted above, USAA has, in numerous other cases, actively and aggressively invoked Federal jurisdiction on the grounds that it is a corporation, a reciprocal inter-insurance exchange or otherwise a resident and citizen of Texas and not a citizen of any other state. Some of these assertions were also supported by verifications under oath. (See Addendum, Cases No. 12, 30 and 72 filed in support of the motion for sanctions, filed concurrently herewith.) As such, there is an evidentiary conflict as to USAA's citizenship.

Not only is the evidence on the issue of USAA's citizenship in conflict, so, too, is the law. As cited by

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[60] See Addendum, p. 3: Exhibit "F".

[61] Addendum: Exhibit "A" – Case #11.

USAA, the court in *Tuck* held that because USAA contended it was an unincorporated association, it was not subject to diversity jurisdiction. On the other hand, in *USAA v. Glen Falls Ins. Co.*, 429 F.Supp. 101, 105, the court concluded that USAA was a "Texas corporation" and found diversity jurisdiction on that basis. Plaintiffs are unaware of any Ninth Circuit decision concerning the issue of USAA's status for diversity purposes.

Also as noted above, USAA itself has acknowledged, admitted and convincingly argued that it is a Texas corporation for diversity purposes in *Pridgen v. USAA*[62]. The argument USAA made in *Pridgen*, i.e., that a reciprocal insurance exchange is a corporate creature, comports with California law as well. (See Insurance Code sections 1301, et seq.) As stated in *Mitchell v. Pacific Greyhound Lines*, 33 Cal.App.2d 53, 91 P.2d 176, 182:

> "A reading of the reciprocal act and of the liquidation act of this state . . . leads us to the conclusion that a reciprocal exchange is to be treated as an entity for the purposes of liquidation, as well as for the purposes of regulation and supervision."

In fact, under California law, no action may be brought against a subscriber in a reciprocal insurance exchange until a final judgment against the exchange itself remains unsatisfied for at least 30 days. (California Insurance Code section 1451.) Additionally, California Insurance Code section 1323 expressly provides that a reciprocal insurance exchange, in order to issue policies in this state, must consent to jurisdiction in actions

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[62] Addendum, p. 16: Exhibit "A" – Case #72.

"brought either in the county in which the person or property insured is located, or in which the exchange has its principal office or place of business in the State. . . ." Thus, California law, as well as Texas law, supports the conclusion that USAA is a corporate-type entity for purposes of diversity jurisdiction.

Because there is conflicting evidence, and conflicting law, regarding the diversity issue, this Court may determine credibility, resolve the factual disputes and determine the diversity issue on that basis. (*Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979).)

It is apparent that USAA's legal status has never had the benefit of an evidentiary hearing nor been fully briefed. This left USAA open to argue it was an unincorporated association when that view suited its objective of denying federal court jurisdiction and to argue that it was a corporation for the purpose of invoking federal court jurisdiction when that jurisdiction suited its purpose. This carefully cultivated practice has gone on for years and has resulted in depriving unsuspecting litigants of the proper court to try their case, in judgments in courts which may not have had jurisdiction, in defeating other judgments in which jurisdiction may have been valid, and in conflicting and wrongly decided decisions.

If necessary, this Court could hold an evidentiary hearing, and/or call for briefing, to determine once and for all whether USAA's status as a reciprocal insurance exchange under Texas law classifies it as a citizen of the State of Texas for jurisdictional purposes or whether it is truly an unincorporated association, as that term has

been used by the federal courts for jurisdictional analysis.[63]

4.

THE COURT HAS INHERENT POWER TO IMPOSE SANCTIONS; MOREOVER, SANCTIONS MAY BE IMPOSED UNDER F.R.C.P. 11.

The information on other cases presented here is relevant to determining both the existence of a deliberate strategy on the part of USAA to defraud and deceive, and also to access the amount of damages necessary to deter it. Rule 404 of the Federal Rules of Evidence specifically authorizes the admission of evidence of other crimes, wrongs, or acts as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. That USAA's unconscionable behavior in this case was no accident is clear from a review of the evidence of USAA's calculated deception and systematic abuse of the federal courts of this nation. "A history of prior misconduct on the part of the defendant is a factor

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[63] In addition, there are other means by which this Court may retain jurisdiction of USAA in this action. Even if USAA were, in reality, an unincorporated association, FRCP 21 would permit amendment to dismiss the non-diverse members of the defendant. (*Newman-Green, Inc. v. Alejandro Alfonzo-Larrain, et al.*, 492 U.S. 932, 110 S.Ct. 12, 106 L.Ed.2d 627 (1989); *Dollar SS Lines v. Merz*, 68 F.2d 594 (9th Cir. 1934). Additionally, this Court could permit amendment to assert his action against USAA's attorney-in-fact as the representative of the class of diverse defendants. This is the very vehicle utilized by the District Court in *Tuck* after remand from the appellate court. (See Declaration of Patrick E. Carr.)

that militates in favor of imposing a stricter sanction." G. Joseph, *Sanctions: Federal Law of Litigation Abuse* 244 (1989). *Cf. McLaughlin v. Bradlee*, 803 F.2d 1197, 1206 (D.C. Cir. 1986) (Sanctions imposed as a matter of course of "harassment by litigation".)

In *Link v. Wabash R. Company*, 370 U.S. 626, 632, 82 S.Ct. 1386, 1389, 8 L.Ed.2d 734 (1962), the Supreme Court recognized as "well-acknowledged" the inherent power of a court to levy sanctions in response to abuse of litigation practices. See also *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 765, 100 S.Ct. 2455, 2463, 65 L.Ed.2d 488 (1980). The inherent powers of federal courts are those which "are necessary to the exercise of all others", *Id.*, quoting *United States v. Hudson*, 7 Cranch 32, 34, 3 L.Ed. 259 (1812). "The inherent power to sanction is staggeringly broad. It applies to all proceedings, and no one is exempt from its reach", G. Joseph, *Sanctions: The Federal Law of Litigation Abuse*, 25 (1989).

The Court has inherent power to impose reasonable and appropriate sanctions for abusive litigation practices or for violations of procedural rules or court orders. *Donaldson v. Clark*, 819 F.2d 1551, 1557 (11th Cir. 1987). Courts under their inherent powers have developed a wide range of tools to promote efficiency in their court rooms and to achieve justice in their results. *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557, 564 (3rd Cir. 1985). The contempt power is also rooted in the inherent power of the judiciary. *Levine v. United States*, 362 U.S. 610, 615, 80 S.Ct. 1038, 1042, 4 L.Ed.2d 989 (1960). "It is sheer sophistry to argue that the trial court has no inherent power to enforce its rules, orders or procedures, and to impose appropriate sanctions for failure to comply. The

authorities are all to the contrary." *Link v. Wabash R. Company*, 291 F.2d 542, 546 (7th Cir. 1961).

In *NASCO, Inc. v. Calcasieu Television & Radio, Inc.*, 124 F.R.D. 120, 146 (W.D. La. 1989), the court imposed sanctions in the sum of $996,644.65 in attorneys' fees and expenses on a defendant who pursued a series of frivolous defenses to a valid contract, resulting in years of delay and fees and expense. "The shoe fits a frivolous defense as well as it does a frivolous cause of action." *Id.* at 144.

The Court in *Nasco* spoke of the "sordid, dishonest and deliberately unethical chain of events called a lawsuit" and accused the participants of engaging in a conspiracy unrestrained by "any sense of honesty, integrity or ethics", the very first act of which was to manufacture as a "defense" what was in reality nothing more than a "web of deliberate fabrications, misrepresentations and fraud, some of which were intended to mislead the public in general while others were aimed only at the Court and opposing counsel". *Id.* at 131. The same is true here, as well, only it is not just one lawsuit that is affected but an entire pattern of litigation by USAA which is "sordid", "dishonest", and "deliberately unethical", and not only one defense which is designed to mislead but a systematic scheme to manipulate the Federal court system.

Noting that NASCO's counsel represented not only NASCO but the public in seeking sanctions, *id.* at 138 n.10, and that sanctions other than expenses and attorneys' fees may be more appropriate, *id.* at 139, the Court in *NASCO* relied on its "inherent power to levy sanctions in response to abusive litigation practices", *id.*, and

awarded close to one million dollars in sanctions. *Id.* at 143. The Court stated that the wielding of its inherent power was particularly appropriate when the offending parties have practiced a fraud upon the Court, and that such power was incident to the Court's "duty to protect the integrity of the judicial process". *Id.* at 140. Here, too, the perpetrators are guilty of "acts which degrade the judicial system"; here, too, "the very temple of justice has been defiled". *Id.* at 139.

> The Courts should not hesitate to address and sanction similar transgressions in whatever the judicial theater they may occur. This case is as classic an example of vicious, deliberate, deceitful, fraudulent and sanctionable conduct as the Courts can produce. *Id.* at 142-3.

Here, too, the sanctions should be "sufficiently severe to convince others that such tactics shall not be tolerated in the Courts of these United States". *Id.* at 143.

This Court has the inherent power to impose a variety of sanctions to regulate the docket, promote judicial efficiency, and to deter frivolous filings. *Casper v. Commissioner of Internal Revenue*, 805 F.2d 902, 906 (10th Cir. 1986); *Betz v. United States*, 753 F.2d 834, 835 (10th Cir. 1985).

Courts have previously expressed their concern that the inherent powers of a court, reinforced by the rules, including the employment of sanctions, to manage its docket be taken seriously at a time when both trial and appellate courts are faced with the task of ever burgeoning dockets. *D.H. Marketers, Inc. v. Freedom Oil and Gas, Inc.*, 744 F.2d 1443, 1444 (10th Cir. 1984). "There is a perceived growth in the use of sanctions at both levels to

insure the performance of the recently heightened duties of attorneys and parties in the process of reasonable and expeditious disposition of cases." *Id.* This includes a re-emphasis of the Court's inherent power to impose sanctions where necessary. *Id.* at n.1.

"To deter frivolous and abusive litigation and promote justice and judicial efficiency, the federal courts are empowered to impose monetary sanctions, by statutes and the rules of civil and appellate procedure as well as their inherent right to manage their own proceedings." *Braley v. Campbell,* 832 F.2d 1504, 1510 (10th Cir. 1987).

This Court is faced with what appears to be a very serious, prolonged, knowing, and inexcusable imposition on the already overburdened Federal court system by a gigantic insurance company which does not hesitate to manipulate the courts to suit its purposes, invoking diversity jurisdiction here, denying it there, all as may suit its advantage. How better to punish USAA for its misdeeds, and deter both it and others from doing so again, than by imposing sanctions on USAA of sufficient magnitude to finally get its attention. There is no authority for the proposition that financial sanctions by a federal court or abuse of the judicial process before that court must be directly related to the other litigants' costs. *Eash v. Riggins Trucking,* 752 F.2d at 566.

Monetary sanctions may be the most effective way to deter a powerful and wealthy party from bringing frivolous or vexatious litigation. *Donaldson v. Clark,* 819 F.2d 1551, 1557 (11th Cir. 1987). The situation is very similar to the awarding of punitive or exemplary damages where the financial worth of the defendant may be taken into

account in arriving at the amount of damages required to deter others and to punish. *Mitchell v. Ford Motor Credit Co.*, 688 P.2d 41 (Okla. 1984). The wealth of the defendant and the risk created by defendant's negligent conduct are substantial factors to be considered in calculation of punitive damages. *Silkwood v. Kerr McGee Corp.*, 769 F.2d 1451 (10th Cir. 1985). In this case, the risk created is that judgments rendered in diversity cases involving USAA all over the country, past, present, and future, are, or will be, subject to being vacated with the resultant "enormous waste of judicial time and resources", *Tuck*, 859 F.2d at 846. Both injuries inflicted on the plaintiff and to society generally may be taken into account. *Silkwood*, 769 F.2d 1451.

USAA is a multi-*billion* dollar insurance company whose assets according to the latest financial report as it appears in Best's Key Rating Guide, Property Casualty Edition, 1991, total $5.6 *billion* and which maintains a policyholder surplus of 2.7 *billion*.[64] An appropriate monetary sanction, based on USAA's net worth and in an amount calculated to deter any further abuse of the Federal court system, would be $10,000.00 per case listed in the Addendum and *Tuck*, which amounts to $1.72 million in sanctions. Although such punishment may be viewed as severe by some, it is necessary in order to send a clear message to USAA that its conduct much [sic] stop. Moreover, this sanction constitutes less than *one-tenth of one percent* of USAA's surplus for 1990.

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[64] See Addendum, Exhibit HH.

5.

CONCLUSION

USAA's systematic manipulation of the Federal courts' jurisdictional rules must be stopped. USAA seeks to dismiss this case for no other purpose than its own self-interest. USAA should not be permitted to further exploit the rules and this action should be maintained by this Court. The motion to dismiss should therefore be denied.

As reflected in the addendum, the list of cases in which USAA has manipulated the Federal courts *literally* goes on and on. USAA's pattern of deliberate abuse of the Federal Courts is probably the most wide-spread, nefarious scheme perpetrated on the Federal courts in the history of the federal judiciary. USAA argues it is a corporation or a corporate-like entity when it suits USAA to be in Federal court and argues it is an unincorporated association when it suits USAA to get out of Federal court. This pattern of false and fraudulent conduct justifies the most severe sanctions. USAA has literally lied under oath to the Ninth Circuit Court and numerous others.

It is time for USAA to step up to the plate, admit its wrongdoing and allow this court to severely sanction it for the most widespread fraud ever committed upon the Federal court system. The Addendum lists 171 cases in addition to *Tuck* in which USAA falsely or fraudulently acted in regard to Federal jurisdiction. It is respectfully suggested that an award of sanctions in the amount of $1.72 million is essential to preserve the integrity of the Federal judiciary and to send a message to USAA and

others that manipulation of the Federal judiciary is a serious offense that is not to be tolerated.

Dated this 15 day of October, 1991 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: /s/ WMS
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STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

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REQUEST FOR SANCTIONS MEMORANDUM
OF POINTS AND AUTHORITIES

on all interested parties in this action:

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/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

91-1707

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

IN RE
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner

**Petition For Writ Of Mandamus,
Prohibition Or Other Appropriate Remedy
To The United States District Court
Central District of California**

**Petition For Writ Of Mandamus
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 WFN ADDENDUM IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR LEAVE TO AMEND AND REQUEST FOR SANCTIONS Date: November 8, 1991 Time: 8:30 a.m. Room: To be assigned (Judge Wm. Fremming Nielsen)

Attached for the Court's reference is a compilation of cases and documents reflecting USAA's various pleadings in various cases as reflected in plaintiffs' Memorandum of Points and Authorities filed concurrently herewith.

Dated this 15 day of October, 1991 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: William M. Shernoff
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IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH COURT

LEROY TUCK, Administrator of the
Estate of JOHNNY L. TUCK, Deceased;
LEROY TUCK, an individual, and
DOROTHY TUCK, an individual,
Plaintiffs/Appellees,

vs.

ROBERT F. McDERMOTT, as the Class Representative
of the diverse Subscribers of
UNITED SERVICES AUTOMOBILE ASSOCIATION,
Defendant,

and

UNITED SERVICES AUTOMOBILE ASSOCIATION,
An Unincorporated Association,

Appellee.

ADDENDUM TO APPELLEES' BRIEF IN SUPPORT OF APPELLEES' MOTION TO IMPOSE SANCTIONS

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MASTER LIST OF CASES

This is a listing of cases in which United Services Automobile Association has been involved as a party and in which the basis of Federal court jurisdiction is, or appears to be, diversity of citizenship.The cases are listed in reverse chronological sequence in the order in which the case, first, was closed and, second, was opened.

I. The following 22 cases were filed or remained opened, after the Tenth Circuit's decision in *Tuck* on 10/14/88, which directed USAA to file motions to dismiss in all diversity cases:

Case #1: *United Services Automobile Association v. Jeremy Arey, et al.*, 89-0139-A, Western District of Virginia. Complaint for Declaratory Judgment filed by USAA on 7/31/89. USAA alleged it was a Texas corporation and a citizen of Texas. Answer filed by Defendant Arey on 8/16/89. Set for trial on 9/20/90.

Case #2: *Insurance Company of the State of Pennsylvania v. Pacific Engineering and Production Co. of Nevada, Inc., et al., and United Services Automobile Association*, CV-S-89-380-PMP (LRL), District of Nevada. Complaint for Declaratory Judgment filed on 5/12/89. USAA alleged to be a reciprocal interinsurance exchange. USAA's Answer filed on 12/27/89. Case is still pending.

Case #3: *United Services Automobile Association v. Kenneth F. Barger, Jr.*, C 88-4007Y, Northern District of Ohio. Complaint for Subrogation filed by USAA on 10/31/88. USAA alleged it was Texas corporation. Defendant Barger's Answer filed on 12/21/88. Motions for Summary Judgment

were filed by USAA and Barger on 3/23/89. Barger's Motion for Summary Judgment and USAA's denied on 7/24/89. USAA filed its Notice on Appeal on 8/18/89. USAA's Brief in Chief was filed on 10/27/89. Appellee's Brief was filed on 11/28/89. USAA's Reply Brief filed on 12/22/89, and Appendix on 12/27/89. Oral argument on 5/8/90. Affirmed by the Sixth Circuit on 8/6/90. Mandate issued on 8/27/90.

Case #4: *Luz Stout and Lloyd Stout, individually, and as the natural Administrators of the Estate of their minor child, Angie Stout, v. Linda Claing Hamby and United Services Automobile Association,* 88-800, Middle District of Louisiana. USAA's Petition for Removal was filed on 9/22/88. USAA alleged that it was a foreign insurer whose principal place of business and whose citizenship for purposes of diversity was a state other than the State of Louisiana. Joint Motion to Remand granted 1/9/90.

Case #5: *Pacific International Services Corp. v. Kaji, et al., and United Services Automobile Association,* 89-00074-ACK, District of Hawaii. Complaint for Declaratory Judgment filed on 1/31/89. USAA's Motion to Intervene filed 3/24/89. Granted 4/25/89. USAA's Answer and Counterclaim filed on 6/6/89. USAA alleged it was a Texas corporation. Pacific International's Answer filed on 8/11/89. Stipulation for Dismissal without prejudice filed 11/21/89.

Case #6: *Transamerica Insurance Group v. Hawaiian Insurance and Guaranty Co., Ltd. and United Services Automobile Association,* 87-483-ACK, District of Hawaii. Complaint filed on 6/19/87. USAA's Answer filed 8/3/87. Case consolidated with 84-300 (Case #7) on 10/06/87.

Case #7: *United Services Automobile Association v. Hawaiian Insurance and Guaranty Co., Ltd., et al.*, 87-300-ACK, District of Hawaii. USAA's Complaint for Declaratory Judgment filed on 4/3/84. USAA alleged it was a Texas corporation. USAA filed Motions for Summary Judgment or Partial Summary Judgment on 4/2/85, 7/17/85, and 8/13/86, which were granted. A final Motion for Summary Judgment was filed by USAA on 2/29/88, which was granted on 6/21/88. HIG's Notice of Appeal was filed on 7/1/88, and its Amended Notice of Appeal on 7/8/88. USAA moved for entry of judgment on 4/14/89, which was granted on 8/4/89. USAA was awarded $318,720.88, plus $53.38 per day in interest after 2/29/88, the date of USAA's Motion for Summary Judgment. Appellant's Brief filed 1/19/89. USAA's Brief filed 3/22/89. Reply Brief filed 5/4/89. Oral arguments held on 6/6/89. Affirmed by the Ninth Circuit on 11/21/89.

Case #8: *Robert D. Liles, Jr., and Lois Liles v. United Services Automobile Association*, EC-86-336-S-D, Northern District of Mississippi. Petition for Removal filed by USAA on 11/19/86. USAA alleged it was a "corporate non-resident of the State of Texas" and was "not now and was not at the time of the institution of this accident nor at any time a citizen or resident corporation of the State of Mississippi." In its Response to Request for Admissions dated 6/8/88, USAA stated it was a "reciprocal inter-insurance exchange." Verdict of $500.00 for Plaintiffs rendered on 7/29/88. Order Vacating Judgment and Remanding Cause for Lack of Jurisdiction Over the Subject Matter signed 10/19/89.

Case #9: *Shelly Eason v. United Services Automobile Association,* 89-CV-594, Northern District of Georgia. USAA's Petition for Removal filed 3/29/89. USAA alleged that the proper Defendant was USAA Property and Casualty Company. Defendant was alleged to be a Texas corporation. Plaintiff's First Amendment to Complaint adding USAA Property and Casualty Company in place of United Services Automobile Association filed 5/11/89. Joint Motion to Remand filed 5/30/89, on the grounds that the case was not properly removable. "Defendant" was alleged to be a reciprocal interinsurance exchange. Consent Order Granting Motion to Remand signed 6/12/89.

Case #10: *Linda Mucha v. USAA (United Services Automobile Association),* S 87-0569 (G), Southern District of Mississippi. Complaint filed 9/10/87. USAA was alleged to be a Texas corporation. USAA's Answer filed 10/21/87, admitting that allegation. The case was settled and dismissed 5/18/89.

Case #11: *Donald L. Smith v. United Services Automobile Association,* 88-0324-C-1, Eastern District of Missouri. Complaint filed on 2/22/88. USAA is alleged to be a Texas corporation. USAA's Answer filed 3/29/88, admitting that allegation. Judgment for Plaintiff for $2,400.00 on 8/18/88. Dismissal of Count II With Prejudice filed by Plaintiff on 4/13/89. Satisfaction of Judgment filed 4/13/89.

Case #12: *United Services Automobile Association v. Anthony Evangelista, Administrator of the Estate of Benson Evangelista,* 87-7793, Eastern District of Pennsylvania. Complaint for Declaratory Judgment filed by USAA on 12/4/87. USAA alleged

it was Texas corporation. Motions for Summary Judgment filed by both parties on 6/30/88. USAA's Motion granted and Defendant's denied 10/13/88. Defendant's Notice of Appeal filed 11/1/88. Appellant's Brief filed 12/14/88. USAA's Brief filed 1/13/89. Reply Brief filed 1/27/89. Case submitted 2/1/89. Judgment affirmed by Third Circuit on 3/10/89. Mandate issued 4/3/89.

Case #13: *William Adam Herrmann v. United Services Automobile Association,* SA-87-CA-0316, Western District of Texas. Complaint filed 3/4/87. Amended Complaint filed 3/29/88. USAA was alleged to be a reciprocal insurance exchange "incorporated" under the laws of Texas. USAA's Answer filed 4/7/88. USAA denied there was diversity of citizenship. USAA's Motion to Dismiss for Want of Subject Matter Jurisdiction filed 3/22/89, and granted 4/5/89.

Case #14: *United Services Automobile Association v. Anita M. Jelks,* 88-58-CIV-2, Eastern District of North Carolina. State Complaint filed by USAA on 10/12/88. USAA alleged it was a Texas corporation. Petition for Removal filed by Jelks on 10/24/88. Jelks filed Answer and Counterclaim 11/3/88. USAA filed Reply to Counterclaim 11/28/88. USAA denied it was a corporation and alleged that the Court lacked subject matter jurisdiction. USAA filed Proposed Amendment to Complaint on 12/14/88, alleging it was an unincorporated insurance association. USAA filed Motion to Remand 1/19/89. Granted on 3/16/89.

Case #15: *Herese M. Patton v. James A. Smith and United Services Automobile Association,*

CV-87-1906, Western District of Louisiana, USAA's Petition for Removal filed 8/31/87. Case was settled on 2/28/89, and dismissed 3/2/89.

Case #16: *Eulema Dennis v. United Services Automobile Association,* CIV-88-2045-A, Western District of Oklahoma. Complaint filed 11/17/88. USAA's Motion to Dismiss filed 1/3/89. Joint Dismissal Without Prejudice filed 1/20/89. (Linda Alexander, Attorney for USAA).

Case #17: *George B. Lovelace, III, et al. v. United Services Automobile Association, et al.,* CIV-88-1236-P, Western District of Oklahoma. Complaint filed 7/22/88. USAA's Suggestion of Lack of Subject Matter Jurisdiction and Motion to Dismiss filed 8/18/88. USAA's Motion to Dismiss granted 11/23/88. Complaint dismissed with prejudice against USAA 12/16/88. (Linda Alexander, Attorney for USAA).

Case #18: *Hartford Casualty Insurance Co. v. Arthur J. Kennedy, et al., and United Services Automobile Association,* 88-CV-250, Northern District of Georgia. Complaint for Interpleader filed 2/5/88. USAA's Answer filed 6/3/88. Consent Judgment 1/24/89.

Case #19: *Morillas, et al., v. Progressive Casualty Insurance Co., et al., and United Services Automobile Association,* CV-87-2791, Western District of Louisiana. Case removed prior to USAA's entry. USAA sued as third-party defendant on 6/23/88. USAA filed Reconventional Demand on 7/19/88, and its Answer on 6/28/88. USAA's named as Defendant in Second Amended Complaint 8/11/88. Plaintiffs advised they would refile in state court 11/23/88. Action

administratively terminated without prejudice on 12/9/88.

Case #20: *James Porter and Rene Porter v. United Services Automobile Association and USAA Casualty Insurance Company,* CV-88-PT-0286-S, Northern District of Alabama. Complaint for breach of uninsured motorist policy filed 2/23/88. Complaint stated "Defendant is a corporation organized and existing under the laws of a state other than Alabama." USAA's Answer filed 3/23/88. Pre-Trial Order filed 9/29/88, admitted diversity of citizenship. Case was settled and dismissed on 12/14/88.

Case #21: *Integrity Insurance Company v. Barbara M. Dudney, et al., and United Services Automobile Association,* 3-87-0059, Middle District of Tennessee. Complaint for Declaratory Judgment filed 1/26/87. USAA was alleged to be a Texas corporation. USAA's Answer filed 2/19/87, admitted the truth of the allegation. USAA filed Motion to Dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6). Granted on 11/28/88.

Case #22: *Dennis O'Brien, M.D., v. USAA Properties II, Inc., d/b/a USA Property and Casualty Insurance and United Services Automobile Association,* 88-CV-1124, Northern District of Georgia. Complaint filed 5/23/88. United Services Automobile Association substituted as proper party defendant on 7/12/88. Motion to Dismiss for Lack of Jurisdiction Over the Subject Matter filed 8/12/88. Granted on 10/19/88.

II. The following 14 cases were filed or remained opened after the Claims Department Bulletin dated

5/2/88, which directed Claims personnel to seek dismissal of cases in which cases based on diversity in which USAA was named as a defendant, but which were closed before the Tenth Circuit's decision in *Tuck:*

> **Case #23:** *United Services Automobile Association v. Marc Jeser, et al.*, 88-1997, District of New Jersey. USAA's Complaint for Declaratory Judgment was filed on 5/4/88. USAA stated that it was a reciprocal interinsurance exchange but nevertheless alleged that it was a "corporate citizen of Texas" and that there was complete diversity of citizenship. Jeser's Answer and Counterclaim filed 6/8/88. Case was settled and dismissed on 9/6/88.
>
> **Case #24:** *Malcolm P. Dulock v. United Services Automobile Association*, 87-CV-1673, Northern District of Georgia. USAA's Petition for Removal filed 7/24/87. Pre-Trial Order filed 6/27/88. Jury verdict for USAA 8/30/88. Costs taxed for USAA 9/20/88.
>
> **Case #25:** *United Services Automobile Association v. Fugua Industries, Inc., et al.*, CIV-86-1350BT, Western District of Oklahoma. USAA's Complaint for Subrogation filed on 6/19/86. USAA alleged that it was a "an insurance company, domiciled in Texas." The final Pre-Trial Order filed 4/29/87, stipulated to the allegation and that the Court had jurisdiction over the subject matter. Jury verdict in favor of Defendants and against USAA on 5/13/87. USAA's Objection to Defendant's Motions for Attorney's Fees and Costs filed 6/2/87. USAA's Notice of Appeal of Magistrate's Decision filed 8/28/87. Appeal denied 2/29/88. Release and Satisfaction of

Judgment for attorney fees and costs filed 9/23/88.

Case #26: *United Services Automobile Association v. Barbara Weappa, et al.*, CV-86-AR-5072-NW, Northern District of Alabama. USAA's Complaint for Declaratory Judgment was filed on 2/10/86. USAA alleged it was an "insurance association incorporated under the laws of the State of Texas." Weappa filed Amended Answer and Counterclaim 4/29/86. USAA's Answer to Counterclaim filed 8/4/86. Pre-Trial Order filed 8/5/86. Diversity of citizenship was admitted. Counterclaim dismissed by Weappa on 10/15/86. Judgment in favor of USAA 11/5/87. Notice of Appeal filed 12/15/87. Affirmed by Fifth Circuit 8/5/88, mandate issued 8/31/88.

Case #27: *Timothy McGuire and Rosemary McGuire v. United Services Automobile Association and USAA Casualty Insurance Co.*, CV-S-87-601-LDG, District of Nevada. USAA's Petition for Removal filed 8/11/87. Joint Pre-Trial Order filed 6/13/88. Case settled on 7/26/88, and dismissed 7/28/88. Removal bond exonerated 8/18/88.

Case #28: *United Services Automobile Association v. Gina M. Burlison, et al.*, 88-CV-1420, Northern District of Georgia. USAA's Complaint for Interpleader filed 7/1/88. Order Granting Motion for Disbursement of Registry Funds ($300,000.00) on 7/25/88.

Case #29: *Brian G. Maloney v. Peter D. Ryan and United Services Automobile Association*, 87-2092, District of Maryland. Complaint filed 8/3/87. USAA's Motion to Intervene filed 2/20/88. USAA's Answer filed 3/2/88. Motion to Intervene granted 3/11/88. Case settled 5/24/88.

Case #30: *Kimberly Myers Liles v. United Services Automobile Association,* EC 86-337-S-D, Northern District of Mississippi. USAA's Petition for Removal filed 11/19/86. Consolidated with 86-336 on 8/13/87. Case dismissed with prejudice 5/19/88.

Case #31: *United Services Automobile Association v. William S. Stryker, M.D., et al.,* 86-2272-S(IEG), Southern District of California. USAA's Complaint for Declaratory Judgment filed on 11/18/86. USAA stated that it was a reciprocal interinsurance exchange with its principal place of business in San Antonio, Texas. USAA's Reply to Counterclaim of Defendants filed 3/26/87. Case settled and dismissed with prejudice on 5/11/88.

Case #32: *Carmen Vasquez and Marie Vasquez v. Luis E. Cruz Bermudez and United Services Automobile Association,* 86-0835-GG, District of Puerto Rico. Complaint filed 5/29/86. Answer filed 8/19/86. Case Settled 3/10/88. Order and Judgment 5/3/88.

Case #33: *United Services Automobile Association v. Sylvia Hunter Vaughn, et al.,* EC-86-16-D-D, Northern District of Mississippi. USAA's Complaint for Interpleader and Declaratory Judgment filed 1/14/86. USAA stated it was a reciprocal interinsurance exchange but alleged complete diversity of citizenship. Consolidated with EC-84-412, EC-84-413, and EC-84-414 (Cases #34-36) on 2/18/86.

Case #34: *Francis M. Vaughn, IV v. United Services Automobile Association,* EC-84-414-D-D, Northern District of Mississippi. Adult son of deceased subscriber, Francis M. Vaughn, Jr., filed Complaint on 12/12/84. USAA was stated

to be a reciprocal interinsurance exchange and the action was alleged to between citizens of different states. USAA's Answer filed on 2/6/85. USAA admitted the truth of those allegations. Case was consolidated with EC-84-412 and EC-84-413 on 2/14/86.

Case #35: *Sylvia Louise Vaughn v. United Services Automobile Association,* 84-413-D-D, Northern District of Mississippi. Complaint for bad faith breach of uninsured motorist policy filed by adult daughter of the named insured, Francis M. Vaughn, Jr., filed on 12/12/84. USAA was alleged to be a reciprocal interinsurance exchange and the action was alleged to between citizens of different states. USAA's answer filed on 2/6/85. USAA admitted the truth of those allegations. Case consolidated with EC-84-412 and EC-84-414 on 2/14/86.

Case #36: *Sylvia Hunter Vaughn v. United Services Automobile Association,* EC-84-412-D-D, Northern District of Mississippi. The spouse of the named insured, Francis M. Vaughn, Jr., deceased, filed her Complaint on 12/12/84. USAA was alleged to be a non-resident reciprocal interinsurance exchange and the action was alleged to be between citizens of different states. USAA's Answer was filed on 2/6/85. USAA admitted the truth of those allegations. Case consolidated with EC-84-413, EC-84-414 and EC-86-16 on 2/14/86. USAA's Motion for Summary Judgment filed 2/16/86. Granted on 5/31/88. Consolidated cases dismissed 5/31/88.

III. The following 38 cases were filed or remained opened after USAA filed its Motion to Dismiss in *Tuck* on 4/15/86, but before the Claims Department Bulletin:

Case #37: *Edgar A. Breland, Administrator of the Estate of Jarvis Breland, v. United Services Automobile Association,* 88-0131A, Eastern District of Virginia. Complaint filed 2/8/88. USAA's Motion to Dismiss for lack of subject matter jurisdiction over the subject matter filed 3/3/88. Breland agreed to voluntary dismissal.

Case #38: *Edith Gill, individually and as committee of Joseph E. Gill, and United Services Automobile Association v. Rollins Protective Service Co.,* 81-698-A, Eastern District of Virginia. Complaint filed 7/15/81. Rollins moved to add USAA as plaintiff. Motion granted. Jury returned verdict for plaintiffs. Rollins filed Notice of Appeal. Fourth Circuit vacated judgment and remanded case for new trial on 11/28/83. 722 F.2d 55. Jury returned verdict for Rollins. Gill and USAA's Motion for New Trial were denied. Gill and Rollins appealed and Rollins cross-appealed on USAA's claim under the Virginia Consumer Protection Act. The Fourth Circuit reversed denial of Motion for New Trial but affirmed trial court's ruling that USAA had a subrogated claim under the VCPA. 773 P.2d 592, 788 F.2d 1042. Jury again returned verdict for plaintiffs 12/8/86. Rollins filed Notice of Appeal on 12/19/86. Fourth Circuit affirmed judgment on 12/23/87. 836 F.2d 194. Satisfaction of Judgment filed 2/9/88.

Case #39: *James M. Saunders v. United Services Automobile Association,* H 85-0305 (N), Southern District of Mississippi. Complaint filed 9/25/85. USAA's Answer filed 9/8/86. Pre-Trial Order filed 2/4/88. Case dismissed with prejudice on 2/5/88.

Case #40: *Kenneth Hoffman, Executor of the Estate of Sandra Hoffman, Deceased, and Kenneth Hoffman v. United Services Automobile Association,* N 82-337, District of Connecticut. Complaint for Breach of uninsured motorist policy filed on 7/8/82. USAA's Answer filed 10/6/82. USAA's Motion for Summary Judgment granted in part, denied in part, 10/15/87. 671 F. Supp. 922. Case settled and dismissed with prejudice on 1/8/88.

Case #41: *Ronnie Barnes v. United Services Automobile Association,* LR-C-87-787, Eastern District of Arkansas. USAA's Petition for Removal filed 11/3/87. USAA alleged that it was a Texas corporation and "citizen of Texas for the purpose of determining diversity of citizenship." Stipulation of Dismissal by Parties filed 1/5/88.

Case #42: *Ray Holiday and Sandra Holiday v. United Services Automobile Association,* C 87-1281M, Western District of Washington. Complaint for Declaratory Judgment and Damages filed on 9/16/87. USAA was alleged to be an insurance company with its principal place of business in Texas and the action was alleged to be between citizens of different states. USAA's Answer was filed on 10/22/87. USAA denied the latter allegation and as an affirmative defense alleged that the Court lacked jurisdiction over the subject matter. USAA filed a Motion to Dismiss for lack of jurisdiction on 11/10/87. Attached thereto was an Affidavit of John L. Swyers, Vice-President and General Counsel of USAA. The Affidavit alleged that USAA was an unincorporated association and that USAA was [sic] numerous members in the State of Washington. The case was settled on 12/18/87, and dismissed on 12/30/87.

Case #43: *James M. List, et al., v. United Services Automobile Association,* 87-0204-VAC, District of Hawaii. USAA's Petition for Removal filed 3/17/87. USAA alleged that it was a Texas corporation and that the action involved citizens of different states. Stipulation to Remand to Removal Action filed 11/6/87.

Case #44: *Orma Gale Moore v. United Services Automobile Association and Bobbye C. Shine, Administratrix of the Estate of Francis Earle Shine,* S 85-0160(R), Southern District of Mississippi. USAA's Petition for Removal filed 2/20/85. USAA's Answer filed 3/21/85, Amended Answer 6/28/85. USAA's Motion for Summary Judgment filed 3/17/86. Moore's Motion to Remand filed 4/7/86. USAA's Motion was granted and Moore's denied on 6/30/86, and USAA was dismissed with prejudice. Moore filed an [sic] Notice of Appeal on 7/8/86. USAA filed a Motion for Sanctions on 7/10/86, which was denied on 9/3/86. USAA filed a Notice of Appeal on 9/18/86. The judgment of the trial court was reversed by the Fifth Circuit which held that the case had been improperly removed because the bad faith claim against USAA was not a separate and independent claim. 819 F.2d 101. Order of Remand signed 10/9/87.

Case #45: *Jesse D. Edwards v. United Services Automobile Association and Johnny E. Haines,* J 87-0499(B), Southern District of Mississippi. USAA's Petition for Removal was filed on 9/3/87. USAA alleged that it was a Texas corporation and that the action was between citizens of different states. The Plaintiff filed a Motion to Remand on 9/16/87, on the grounds that the

Defendant, John E. Haines, was a citizen of Mississippi, although never served.

Case #46: *Aetna Casualty Insurance Co. v. United Services Automobile Association,* 86-5200, Eastern District of Pennsylvania. The Complaint for Declaratory Judgment was filed 9/3/86. USAA was alleged to be a Texas corporation and the parties were alleged to be citizens of different states. USAA's Answer was filed on 9/29/86, and admitted the truth of the latter allegation. Aetna's Motion for Summary Judgment filed 5/5/87, and USAA's 5/7/87. Aetna's Motion was granted and USAA's denied on 9/24/87. 676 F. Supp. 79.

Case #47: *Hans Markland v. United Services Automobile Association,* L 85-00163, Northern District of Indiana. Complaint for Breach of Contract filed 12/23/85, Amended Complaint 3/13/86. USAA's Answer filed 7/30/86. Case was settled and dismissed 9/25/87.

Case #48: *Dawn A. Bradley v. United Services Automobile Association, et al.,* 87-0188, District of Hawaii. USAA's Petition for Removal filed 3/12/87. USAA alleged it was a Texas corporation and that the action involved citizens of different states. Stipulation to Remand Removal Action filed on 8/10/87, on the grounds that the lack of diversity, citing *Baer.* "This Stipulation is applicable to this action only, and is so limited."

Case #49: *Dawn A. Bradley v. United Services Automobile Association,* 88-0086, District of Hawaii. Complaint for bad faith breach of insurance contract filed 2/9/87. USAA was alleged to be a reciprocal interinsurance exchange but there was alleged to be diversity of citizenship. USAA's Answer was filed on 3/17/87, and

admitted the truth of those allegations. USAA's Scheduling Conference Statement filed 5/26/87, stated that the action was based upon diversity of citizenship, and that USAA was a reciprocal interinsurance exchange. A Stipulation for Dismissal Without Prejudice was filed on 8/14/87.

Case #50: *United Services Automobile Association v. Yong Suk Krieger, et al.*, 86-CV-1638, Northern District of Georgia. USAA's Complaint for Declaratory Judgment filed 7/25/86. USAA's Motion for Summary Judgment filed 12/24/86. Defendant's Motion for Summary Judgment filed 1/30/87. USAA's Motion granted and Defendant's denied on 3/19/87. Notice of Joint Appeal filed 4/3/87. Dismissed by Appellants 7/16/87.

Case #51: *John Cregor v. United Services Automobile Association*, 85-0528, District of Hawaii; 85-C-9171, Northern District of Illinois. Complaint for Declaratory Judgment filed 6/85 in Hawaii. Transferred and filed in Northern Illinois on 11/4/85. USAA's Amended Answer to Complaint filed 2/3/86. Case settled and dismissed with prejudice on 7/17/87.

Case #52: *United Services Automobile Association v. John M. Cregor, Jr., et al.*, 85-C-32-60, Northern District of Illinois. USAA's Complaint filed 4/10/85. Defendant's Motion to Dismiss are transferred on grounds they are citizens of Hawaii filed 6/6/85. USAA's Objection filed 6/18/85. Motion denied 9/30/85. Court found that USAA was a citizen of the State of Texas. 617 F. Supp. 1053. Case was settled 7/7/87, and dismissed 7/17/87.

Case #53: *George J. Woodside, II, et al. v. United Services Automobile Association,* 87-564-M3, Eastern District of Louisiana. Complaint filed 2/6/87. USAA's Answer filed 3/10/87. Dismissal Without Prejudice filed by Plaintiff 6/24/87, because of a pending state court action in re: same claim.

Case #54: *Beth F. Goldman v. Sharon Jett, Administratrix of the Estate of Kermit Jett, deceased, et al., and United Services Automobile Association,* C 86-753A, Northern District of Georgia. Complaint filed 4/2/86. USAA's Answer and Cross-Claim filed 5/27/86. Case settled as to USAA 5/21/87, and dismissed 6/8/87.

Case #55: *Clennarde McCorkle v. United Services Automobile Association and USAA Casualty Insurance Co.,* 85-5472, Southern District of Illinois. USAA's Petition for Removal filed 8/9/85. USAA's Motion to Consolidate and Reopen *USAA v. McCorkle,* 85-5365, filed 6/9/85. Motion denied 10/4/85. Amended Complaint filed 8/5/87. Third Amended Complaint filed 5/20/87. USAA's Answer filed 6/16/87. Jury verdict in favor of Defendant 6/17/87.

Case #56: *Judith Price Behl and Michael Behl v. United Services Automobile Association,* 87-462-CIV-T-10-A, Middle District of Florida. Complaint for Breach of Insurance Contract filed 4/2/87. USAA's Motion to Dismiss filed 5/5/87. Notice of Voluntary Dismissal by Plaintiffs 5/27/87.

Case #57: *Erma Rogers v. United Services Automobile Association and Patricia Ann Berry,* 86-CV-2226, Northern District of Georgia. USAA's Petition for Removal filed 10/16/86. Plaintiff's Motion to Remand for 4/24/87. Granted on

4/29/87. USAA's Response to Motion to Remand Filed 5/11/87, and Motion for Reconsideration 5/12/87. USAA's Motion denied 5/26/87.

Case #58: *Orma G. Moore v. United Services Automobile Association,* S 84-0463(N), Southern District of Mississippi. Complaint for Bad Faith Breach of Insurance Contract filed 5/30/84. USAA's Answer filed 7/11/84. USAA's Motion for Summary Judgment filed 12/12/84. USAA's Amended Answer filed 6/3/85. USAA's Motion for Summary Judgment granted 1/3/86. Moore's Notice of Appeal filed 1/31/86. USAA's Bill of Costs filed and Motion for Sanctions filed 2/3/86. USAA's Bill of Costs approved but Motion for Sanctions denied 4/3/86. USAA's Motion for Application for Review of Magistrate's Ruling on Motion for Sanctions filed 4/14/86. USAA's Objections overruled 5/2/86. Judgment for USAA affirmed by Fifth Circuit 2/5/87. 808 F.2d 1147. Mandate filed 3/31/87. USAA's Bill of Costs on appeals filed 3/31/87.

Case #59: *Jacob V. Elder and Gertrude A. Elder v. Glenn M. Keehn and United Services Automobile Association,* 85-5607, Eastern District of Louisiana. Complaint filed 12/6/85. USAA was alleged to be a foreign insurance company. USAA's Answer 2/5/86. In preliminary pretrial order 3/7/86 jurisdiction was conceded. Sixty Day Order of Dismissal filed 12/1/86. Case dismissed with prejudice 2/2/87.

Case #60: *Ronnie Choate, Administrator of the Estate of Anthony R. Choate, Deceased, v. United Services Automobile Association and Farmers Insurance Company, Inc.,* CIV-85-2656-T, Western District of Oklahoma. Complaint for Breach of Uninsured Motorist Policy filed on 10/30/85.

USAA was alleged to be a foreign insurance corporation and complete diversity of citizenship was alleged to exist. USAA's Answer filed 1/17/86. USAA's Motion for Summary Judgment on the grounds that the present action should be the action of a compulsory counterclaim in an interpleader action pending in state court filed 2/21/86. USAA's Motion granted 7/14/86. Plaintiff's Motion for Reconsideration denied 8/17/86. Notice of Appeal filed 9/10/86. Parties Motion to Dismiss filed 10/2/86. Appeal dismissed 10/8/86. Judgment entered in favor of USAA 2/27/87.

Case #61: *Louis H. Oss and Michelle S. Oss v. United Services Automobile Association,* 85-CV-12, Western District of Texas. Complaint filed for Breach of Insurance Contract filed 1/11/85. Summary Judgment granted in USAA's favor. Oss' Notice of Appeal filed 4/24/86. Appellant's Brief filed 6/9/86. USAA's Brief filed 7/8/86. Reply Brief 7/18/86. Judgment for USAA reversed by Fifth Circuit on 1/8/87. 807 F.2d 457. USAA's Petition for Rehearing filed 1/21/87. Denied 2/3/87. Case reopened 2/18/87. Date closed unknown.

Case #62: *United Services Automobile Association v. Leopold Guzman, et al.,* 85-675-GLW, Western District of Washington. USAA's Complaint filed 4/17/85. USAA alleged it was a Texas corporation. Amended Complaint filed 6/7/85. USAA again alleged it was a Texas corporation. USAA's Motion for Summary Judgment 1/30/86. Defendant's Motion for Summary Judgment 1/31/86. Judgment granted for Defendant's on 4/4/86. USAA's Notice of

Appeal filed 4/7/86. Case was settled 11/10/86. Appeal dismissed 1/17/87.

Case #63: *Margaret Ellen Fletcher v. Victor M. Rodriquez-Torres and United Services Automobile Association,* CV 85-0957-6, Western District of Louisiana. USAA's Petition for Removal filed 4/4/85. USAA's Answer filed 4/17/85. First Supplemental and Amended Answer filed 5/2/85. Plaintiff's First Amended and Supplemental Petition filed 5/10/85. USAA's Answer filed 5/21/85. USAA's Second Supplemental and Amended Answer filed 2/4/86. Plaintiff's Supplemental Petition filed 6/11/86. Verdict for Plaintiff 7/9/86. Judgment in favor of Plaintiff and against Defendants 7/22/86. Joint Stipulation of Dismissal filed 7/29/86. Witness fee taxed against Defendants 12/17/86.

Case #64: *Peggy Wunder, et al., v. United Services Automobile Association,* S 85-1551(NG), Southern District of Mississippi. Complaint for Breach of Uninsured Motorist Policy filed on 12/10/85. USAA was alleged to be a foreign insurance company. USAA's Answer was filed on 1/10/86. USAA denied that allegation but stated that it was a "foreign insurer association" and admitted jurisdiction based on diversity of citizenship. USAA's Amended Answer filed 4/7/86. USAA admitted diversity of citizenship but denied the amount in controversy. Agreed Order to Dismiss With Prejudice filed 11/25/86.

Case #65: *Victor H. Schramm v. United Services Automobile Association,* 85-2928, Western District of Pennsylvania. Petition for Removal filed by USAA on 12/13/85. USAA's Answer filed 1/29/86. Case settled 11/6/86.

Case #66: *Donald L. Horn and Rose M. Horn v. United Services Automobile Association, et al.*, CV-LV-85-1027-HDM, District of Nevada. Complaint for Tortuous Breach of Insurance Contract filed 12/5/85. First Amended Complaint 3/7/86. USAA's Answer filed 4/21/86. Stipulation to Dismiss filed 10/1/86. Dismissed With Prejudice 10/3/86.

Case #67: *United Services Automobile Association v. Earl Ah Moo, D.D.S., et al.*, 85-0523, District of Hawaii. USAA's Complaint for Declaratory Judgment filed 6/4/85. USAA alleged it was a Texas corporation and that "every issue of law and fact herein is wholly between citizens of different states." USAA's Scheduling Conference Statement filed 3/27/86, again alleged diversity of citizenship. Counterclaim against USAA filed 5/20/86. Alleged USAA was a Texas corporation. USAA's Answer to Counterclaim filed 6/2/86, admitted the truth of that allegation. USAA's Motion for Summary Judgment filed 3/31/86. Summary Judgment for USAA 8/1/86.

Case #68: *Sara Dicesara v. United Services Automobile Association*, 86-0532-A, Eastern District of Virginia. Complaint for Declaratory Judgment filed 5/7/86. USAA's Motion to Dismiss filed 6/23/86. USAA's Motion was uncontested and was granted 7/11/86. Case dismissed for lack of jurisdiction 7/11/86.

Case #69: *Glenn L. Brooks v. United Services Automobile Association*, CIV-86-848, Western District of Oklahoma. Complaint for bad faith breach of insurance contract filed on 4/16/86. USAA's Motion to Dismiss for lack of jurisdiction over the subject matter or in the alternative

a stay of the pending state court action filed 5/14/86. USAA's Motion granted 7/30/86.

Case #70: *Michael and Marilyn Wheeler v. Lance Harvey, James R. Harvey, and United Services Automobile Association,* 85-0394, District of Minnesota. Complaint for negligence and direct action against insurer filed 3/15/85. USAA was alleged to be a foreign corporation. USAA's Motion to Dismiss for failure to state a claim on which relief can be granted filed 6/18/85. USAA's Motion denied 9/11/85. The court's [sic] found that USAA was a Texas corporation licensed to do business in Minnesota. USAA's Answer filed 9/25/85 did not specifically admit that it was a corporation. Case was settled and dismissed 5/12/86.

Case #71: *United Services Automobile Association v. Parnell A. Rickerson and Gladys V. Rickerson,* C 85-2031-2-RPA, Northern District of California. USAA's Complaint for Declaratory Judgment filed on 5/17/85. Defendant's Answer filed 7/18/85. USAA's Motion for Summary Judgment filed 1/24/86. USAA's Motion granted 3/10/86. Taxation of costs in favor of USAA 4/15/86.

Case #72: *Henry A. Pridgen, as next friend for Henry A. Pridgen, III, a minor, v. United Services Automobile Association,* 84-247-ALB-AMER, Middle District of Georgia. USAA's Petition for Removal filed 11/14/84. USAA alleged that "Petitioners (sic) are residents and citizens of the State of Texas." Pridgen's Motion to Remand filed on grounds of lack of jurisdiction over the subject matter filed 11/20/84. Pridgen alleged that USAA was an unincorporated association and that "at the time of the filing of Defendant's

Petition for Removal of the action to this Court, both Plaintiff and Defendant were citizens of the State of Georgia." USAA's Brief in Opposition to Plaintiff's Motion to Remand filed 11/29/84. USAA stated that it was a reciprocal interinsurance exchange but alleged that for diversity purposes "USAA should be considered a citizen of Texas." Plaintiff's Motion to Remand denied 12/14/84. Stipulation for Dismissal With Prejudice filed 4/17/86. Judgment dismissing case 4/29/86.

Case #73: *Sandra A. Ruth, surviving spouse of Francis Dean Ruth v. United Services Automobile Association,* CIV-85-913-T, Western District of Oklahoma. Complaint for Breach of Uninsured Motorist Policy filed on 4/8/85. USAA was alleged to be a Texas corporation. USAA's Answer filed 5/10/85. USAA stated that it was without knowledge or information sufficient to form a belief as to the truth of that allegation. USAA's Motion to Dismiss for failure to join an indispensable party or in the alternative for change of venue filed 9/17/85. USAA's Motion denied 11/22/85. Amended Complaint adding claim of bad faith filed 9/17/85. USAA was again alleged to be a Texas corporation. USAA's Answer to Amended Complaint filed 9/26/85. USAA again claimed it was without knowledge or information sufficient to form a belief as to the truth of that allegation. Pre-Trial Conference 2/7/86. USAA's Motion to Dismiss for lack of jurisdiction over the subject matter on the grounds that it was an unincorporated association filed 3/31/86. The case was settled and plaintiff's Application for Order Dismissal With Prejudice filed and granted 4/30/86.

Case #74: *United Services Automobile Association v. General Electric Co.*, H-83-981, District of Connecticut. USAA's Compliant filed 11/22/83. USAA alleged it was a Texas corporation. General Electric's Answer filed 6/4/84. Stipulation of Dismissal filed 4/21/86.

IV. The following 29 cases were filed, or remained opened, after the *Neil* decision on 2/15/84, which warned USAA to stop abusing the Federal court processes, but which were closed before the Motion to Dismiss in *Tuck*.

Case #75: *Barbara Wong v. United Services Automobile Association*, 85-0755-P, District of Rhode Island. Complaint for bad faith breach of uninsured motorist policy filed 12/6/85. USAA was alleged to be a Texas corporation and the claims were alleged to be between citizens of different states. USAA's Answer was filed on 12/27/85. USAA admitted the truth of the first allegation, but alleged it was without knowledge and information sufficient to form a belief as to the truth of the second allegation. Dismissal stipulation filed 3/25/86.

Case #76: *Eddie Oliney v. Samuel Gardner, Morris Gardner, and United Services Automobile Association*, 85-5285A4, Eastern District of Louisiana. Complaint filed 11/15/85. USAA's Motion to State Proceedings and Motion to Dismiss filed 1/24/86. Case Order Stayed on 3/19/86.

Case #77: *Virginia Stephens and B. Milton Stephens v. Mary E. Harrell, et al., and United Services Automobile Association*, CIV-85-2372-A, Western District of Oklahoma. Complaint for breach of uninsured motorist policy against USAA filed

9/26/85. USAA was alleged to be a Texas corporation. USAA's Answer filed 10/24/85. Stephens' Motion to Dismiss USAA Without Prejudice filed 2/28/86. USAA dismissed without prejudice 3/17/86.

Case #78: *Ralph O. Brignon and Norma L. Brignon v. United Services Automobile Association*, 85-5053, Western District of Arkansas. Complaint for breach of uninsured motorist policy filed 3/20/85. USAA was alleged to be a Texas corporation. Amended Complaint filed 4/1/85. USAA's Answer filed 4/22/85. USAA admitted the truth of that allegation. USAA's Amendment to Pre-Trial Conference Information Sheet filed 1/24/86. USAA stated there were no objections to jurisdiction. Jury verdict for Plaintiffs 1/30/86. Judgment 2/6/86.

Case #79: *Timothy Healey, et al., v. United Services Automobile Association*, B-85-501, District of Connecticut. Complaint for breach of insurance contract filed 9/3/85. First Amended Complaint filed 9/12/85. Stipulation of Dismissal filed 1/8/86. Case dismissed 2/7/86.

Case #80: *Julia Ondre v. United Services Automobile Association*, 85-1785-CIV-T-15, Middle District of Florida. Complaint filed 11/14/85. USAA's Motion to Dismiss for improper venue or to transfer venue filed 12/5/85. Complaint dismissed as against USAA for failure to state a claim for relief 1/17/86.

Case #81: *Pauline Shaw v. United Services Automobile Association and Crawford & Co.*, 85-1051, District of Hawaii. USAA's Petition for Removal filed on 8/29/85. USAA alleged that it was a reciprocal interinsurance exchange and "was not and is not a citizen of the State of Hawaii."

USAA's Answer filed 8/30/85. USAA denied that it was a foreign corporation, but alleged that it was reciprocal interinsurance exchange. USAA's Amended Answer filed 9/11/85, made the same allegation. Stipulation for Dismissal With Prejudice filed 1/6/86.

Case #82: *Peggy Ryan and Eddy L. Sapir v. United Services Automobile Association, et al.*, 84-5709-J-6, Eastern District of Louisiana. USAA's Petition for Removal filed 11/29/84. Plaintiffs' Motion to Remand filed 2/14/85. Third-Party Complaint against USAA and City of Orleans filed 11/15/85. Second Supplemental Complaint filed 11/18/85. Further proceedings unknown.

Case #83: *George W. Conrad v. United Services Automobile Association*, 85-1285, Middle District of Tennessee. Complaint for bad faith breach of insurance contract filed 11/1/85. Case dismissed sua sponte by court for lack of jurisdiction over the subject matter on 11/12/85. Judgment 12/18/85.

Case #84: *William H. Quinn, Administrator of the Estate of Aaron Michael Quinn v. United Services Automobile Association*, 85-187, District of Vermont. Complaint for breach of underinsured motorist policy filed 7/22/85. USAA was alleged to be "a reciprocal or interinsurance exchange or corporation existing under the laws of the State of Texas." USAA's Motion to Dismiss for lack of jurisdiction over the subject matter on grounds that USAA was an unincorporated association filed 10/24/85. Case settled and dismissed with prejudice 12/2/85.

Case #85: *Margaret Cohen, as Executrix of the Estate of Carl H. Cohen, v. United Services Automobile Association,* 85-0085, Middle District of Georgia. USAA's Petition for Removal filed 4/1/85. Case submitted to the court on briefs. Judgment for USAA 9/16/85.

Case #86: *United Services Automobile Association v. Jeffrey Sandholm, et al.,* 85-C-112-B, Northern District of Oklahoma. USAA's Complaint for Declaratory Judgment filed 2/7/85. USAA alleged that it was a Texas corporation and that there was complete diversity of citizenship. Defendant's Answer filed 2/28/85. USAA's Motion for Summary Judgment 7/31/85. USAA's Motion granted 12/31/85.

Case #87: *Joseph Boardman and Henry Boardman v. United Services Automobile Association,* S 81-0219 (N), Southern District of Mississippi. Complaint for breach of uninsured motorist policy filed 5/19/81. Boardman's Motion for Partial Summary Judgment filed 8/5/81. USAA's Motion for Summary Judgment 9/4/81. Boardman's Motion sustained, USAA's denied 11/1/82. USAA's Motion to Amend Judgment to allow an interlocutory appeal filed 1/14/83. Amended Judgment 1/28/83. Fifth Circuit determined to certify question to Mississippi Supreme Court 9/14/84. 742 F.2d 847. Question certified 10/23/84. 763 F.2d 663. Question answered 5/22/85. 470 So.2d 1024. Judgment vacated and case remanded on 8/19/85. 768 F.2d 718. Final judgment for USAA 12/9/85.

Case #88: *United Services Automobile Association v. William Massey, et al.,* J 85-0450(L), Southern District of Mississippi. USAA's Complaint for Declaratory Judgment filed 5/10/85. USAA's

Motion for Summary Judgment 10/2/85. USAA's Motion granted 11/12/85. Final judgment 11/19/85.

Case #89: *Eddie Oliney v. Samuel Gardner, Morris Gardner and United Services Automobile Association,* 84-3853D, Eastern District of Louisiana. Complaint for negligence and direct action against Defendant's insurer filed 8/6/84. USAA's Motion to Dismiss for lack of jurisdiction on the grounds that there was not complete diversity of citizenship as Plaintiff Oliney and Defendant Gardner were both citizens of the State of Louisiana at the time the previous case was commenced, filed 1/11/85. USAA's Motion granted 2/13/85. Oliney's Notice of Appeal filed 3/11/85. Fifth Circuit ruled that second suit which attempted to plead new facts related back to filing of first suit and affirmed the judgment on 9/20/85. Rehearing denied 10/28/85. 771 F.2d 856. Cost on appeal taxed 11/7/85.

Case #90: *Iva Jean Holcomb and Curtis Holcomb v. Donald Davis, Jackie Davis and United Services Automobile Association,* 85-C-652-E, Northern District of Oklahoma. Complaint for Negligence and personal injury protection benefits filed 7/11/85. USAA was alleged to be a Texas corporation and diversity of citizenship was alleged to exist between the parties. USAA's Motion to Dismiss for failure to state a claim upon which relief can be granted filed 8/2/85. Case settled and Joint Application of Parties for Dismissal filed 12/30/85. Dismissed 1/7/86.

Case #91: *Alice Elizabeth Webb, Administratrix of the Estate of Sharon Lee Cooper v. United Services Automobile Association,* 85-0669-A, Eastern District of Virginia. Complaint for Declaratory

Judgment filed 6/7/85. USAA was alleged to be a reciprocal interinsurance exchange. USAA's Answer filed 7/3/85. USAA admitted the truth of that allegation. USAA's Motion to Dismiss or Stay Proceedings filed 7/3/85. USAA's suggestion of lack of jurisdiction of the subject matter on the grounds that USAA is an unincorporated association filed 8/1/85. Case dismissed with prejudice on motion of Webb 8/2/85.

Case #92: *United Services Automobile Association v. Clennard E. McCorkle,* 85-5365, Southern District of Illinois. USAA's Complaint for breach of insurance contract filed 6/10/85. Case dismissed 8/24/85 for failure to effect service.

Case #93: *Mr. & Mrs. Peter Wolniewicz, et al., v. Ernest P. Richard, et al., and United Services Automobile Association,* 82-1346M. Eastern District of Louisiana. Complaint filed 4/5/82. USAA's Answer and Cross-Claim filed 6/29/82. Pre-Trial Order filed 2/28/85. USAA's Pre-Trial Memo filed 3/12/85. Jury trial began 5/13/85. USAA's Motion for Mistrial granted 5/14/85. Case dismissed as to USAA on Plaintiffs' Motion 8/5/85. Sixty Day Order of Dismissal 8/14/85.

Case #94: *United Services Automobile Association v. Lawrence Rex Stinson and Kurt Lustbaum,* 85-0034-G, Southern District of California. USAA's Complaint for Declaratory Judgment 1/8/85. USAA alleged that it was a reciprocal insurance exchange and a citizen of the State of Texas. USAA sought a declaration that it had no duty to defend Stinson in a pending state action or to indemnify Stinson for damages which might be awarded against him and in favor of Lustbaum in the action. Stinson's Answer and Cross-Claim against USAA filed 4/10/85.

Lustbaum's Answer and Cross-Claim against USAA filed 4/16/85. Stipulation for Dismissal dismissing USAA's Complaint With Prejudice and other claims without prejudice 7/12/85. Order entered 7/18/85.

Case #95: *Melinda Schesser Grader v. United Services Automobile Association*, 83-1758, District of Kansas. Complaint filed 8/10/83. USAA's Answer filed 10/20/83. USAA's Amended Answer filed 4/10/84. Pre-Trial Conference Order filed 1/16/85. USAA's Motion for Summary Judgment filed 1/3/85. Grader's Motion for Partial Summary Judgment filed 3/4/85. Order of Dismissal of Motions for Summary Judgment 4/1/85. Journal Entry of Dismissal with Prejudice 8/11/85.

Case #96: *Commercial Union Insurance Companies v. John Elson, Sally Elson and United Services Automobile Association Insurance Company*, 84-Z-2176, District of Colorado. USAA's Petition for Removal filed 11/13/84. USAA alleged that it was a reciprocal interinsurance exchange and that "diversity of citizenship of the parties, therefore, exists." Stipulation for Dismissal With Prejudice filed 5/3/85. Order of Dismissal 5/7/85.

Case #97: *United Services Automobile Association v. Kramer Chemical, Inc., et al.*, CV-80-1916, Eastern District of New York. USAA's Complaint filed 7/11/80. USAA's Reply filed 9/30/80. Consolidated with 79-C-712 on 10/2/80. USAA's Answer to Third-Party Complaint filed 1/5/81. CV-80-1916 severed and set for trial 3/31/83. Order of Discontinuance 4/3/85. Stipulation of Discontinuance 11/14/85.

Case #98: *United Services Automobile Association v. Scott Robelen,* CIV-84-1275-E, Western District of Oklahoma. USAA's Complaint for Declaratory Judgment filed 5/21/84. USAA alleged it was a reciprocal interinsurance exchange and that diversity of citizenship existed between the parties. USAA's Notice of Change of Firm Name to Niemeyer, Edmonds, Noland, Alexander & Hargrave filed 9/14/84. Pre-Trial Conference Memo 11/19/84. Stipulation for Dismissal With Prejudice 3/1/85. Dismissed 3/4/85.

Case #99: *Theodore Carter and Verdell Carter v. Scott Mattson, Ronald Mattson, and United Services Automobile Association,* 83-6224H, Eastern District of Louisiana. Complaint filed 12/23/83. USAA's Answer filed 3/2/84. Sixty Day Order of Dismissal filed 2/8/85. Order Dismissing Case With Prejudice on Plaintiffs' Motion 2/26/85.

Case #100: *Leroy King and Barbara King v. United Services Automobile Association,* 82-3678, District of New Jersey. Complaint for breach of insurance contract filed 11/3/82. USAA was alleged to be a Texas corporation. USAA's Answer was filed 1/21/83. USAA admitted the truth of that allegation. The final Pre-Trial Stipulation and order filed 4/10/84, stated the jurisdiction was based on diversity of citizenship and that USAA was an insurance carrier located in the State of Texas. Case settled 2/26/85.

Case #101: *Lumbermen's Mutual Casualty Co. and Ari Kiev, M.D., v. United Services Automobile Association,* CIV-84-3385-L, District of New Jersey. Complaints filed 8/17/84. USAA's Motion to Dismiss filed 11/28/84. Order of Dismissal filed 1/28/85.

Case #102: *Norma Viboud Ruiloba v. A. Berlingery Vicenty*, 83-2384-PG, 9/30/83, District of Puerto Rico. Complaint filed on 9/30/83. USAA's Answer filed 4/4/84. Case settled 12/20/84.

Case #103: *Eddie Oliney v. Samuel Gardner, Morris Gardner and United Services Automobile Association*, 82-4031-A(5), Eastern District of Louisiana. Complaint filed 9/10/82. First Amended Complaint filed 1/19/83. USAA's Answer filed 3/17/83. Answer to Amended Complaint 4/18/83. Second Amended Complaint filed 5/2/84. USAA's Answer to Second Amended Complaint. USAA filed a motion to Dismiss for lack of complete diversity on the grounds that at the time the action was filed, the Plaintiff, Eddie Oliney, and the Defendant, Samuel Gardner, were both citizens of the State of Louisiana. The Plaintiff moved to Missouri in October, 1982. Motion to Dismiss granted 9/5/84. Plaintiff's Motions for Reconsideration and for New Trial filed 9/13/84. Denied 11/9/84. Plaintiff's Notice of Appeal filed 10/05/84. Appeal dismissed for want of prosecution 12/13/84.

Case #104: *United Services Automobile Association v. Alan E. Foster and Elizabeth A. Foster*, 84-916-CIV-T-13, Middle District of Florida. USAA's Complaint for Declaratory Judgment filed 7/10/84. USAA alleged that it was a Texas corporation and that it did not share the same state citizenship with either of the defendants. Defendants' Motion to Dismiss filed 9/20/84, alleged that the Court lacked jurisdiction of the subject matter and that the complaint failed to state a claim upon which relief could be granted

on the grounds that the Defendants had not instituted a suit for coverage, and that therefore no case of controversy existed. USAA's Memorandum of Law in Opposition filed 9/28/84. USAA's Notice of Voluntary Dismissal filed 11/1/84.

Case #105: *United Services Automobile Association v. Ronald L. Brown, et al.*, 84-1471-K(M), Southern District of California. USAA's Complaint for Interpleader and Declaratory Judgment filed 6/22/84. USAA alleged that it was a reciprocal interinsurance exchange with its principal place of business in the State of Texas. Defendants' Petition for Order requiring Plaintiff to arbitrate controversy and to dismiss action filed 9/17/84. USAA's Opposition filed 10/5/84. Motion granted and case dismissed 10/30/84.

Case #106: *Phyllis V. Pauley v. United Services Automobile Association*, J 84-0382(L), Southern District of Mississippi. Complaint for bad faith breach of an uninsured motorist policy filed 5/15/84. USAA was alleged to be an unincorporated association organized under the laws of the State of Texas and a reciprocal interinsurance exchange. The action was alleged to be between citizens of different states. USAA's Answer filed 6/13/84, admitted the truth of those allegations. Case settled and final judgment entered 10/31/84.

Case #107: *Evelyn Nancy Smith, as Administratrix, C.T.A., of the Estate of Herbert Thomas Smith v. United Services Automobile Association, Inc.*, 84-0614, Southern District of Carolina. USAA's Petition for Removal filed 3/27/84.

Case settled and dismissed without prejudice 8/17/84. Dismissed with prejudice 10/30/84.

Case #108: *Winifred D. Bozardt, et al., v. United Services Automobile Association,* C 82-2660A, Northern District of Georgia. USAA's Petition for Removal filed 11/24/82. USAA alleged it was a reciprocal interinsurance exchange of the State of Texas. Amendment to Petition 12/9/82. USAA's Motion for Summary Judgment filed 3/5/84. Granted 9/6/84. Judgment 9/10/84.

Case #109: *Mary E. Spiess and Raymond L. Spiess v. United Services Automobile Association,* A 83-610CIV District of Alaska. USAA's Petition for Removal filed 12/14/83. Stipulation for Dismissal with Prejudice filed 6/22/84. Order granting dismissal 6/26/84.

Case #110: *Marie Isbell and Jimmy Isbell v. United Services Automobile Association,* 83-5627, Easter District of Louisiana. Complaint filed 11/17/83. Pre-Trial Order 6/11/84. USAA's Answer filed 6/28/84. Settled 6/28/84.

Case #111: *Sandra K. Hughes v. United Services Automobile Association,* CIV-83-2960R, Western District of Oklahoma. Complaint for breach of uninsured motorist policy filed 11/30/83. USAA was alleged to be an insurance company organized under the laws of the State of Texas. USAA's Answer filed 12/19/83. Pre-Trial Order filed 3/2/84. USAA was alleged to be a Texas insurance company. Stipulation for Order of Dismissal filed 6/19/84. Order of Dismissal 6/26/84.

Case #112: *Blaise Andrew Horban v. Basin Drilling Corp., et al., and United Services Automobile Association,* CIV-83-1851-W, Western District of

Oklahoma. complaint filed 8/2/83. USAA's Answer filed 9/15/83. Pre-Trial Conference Memorandum 12/7/83. Stipulation for Order of Dismissal 6/6/84. Order of Dismissal With Prejudice 6/7/84.

Case #113: *Margaret Buchholz v. United Services Automobile Association,* EC 83-360-WK-P, Northern District of Mississippi. Complaint for breach of uninsured motorist policy filed 8/9/83. USAA was alleged to be a Texas corporation. USAA's Answer filed 9/16/83, acknowledged the truth of that allegation. Case settled and dismissed with prejudice 6/18/84.

Case #114: *Cynthia Lynn Frazier, et al., v. United Services Automobile Association,* 82-428R, Northern District of Georgia. USAA's Petition for Removal filed 11/29/82. USAA's Motion for Summary Judgment and Motion to Stay filed 1/27/84. USAA's Motion for Summary Judgment granted 6/15/84.

Case #115: *United Services Automobile Association v. Nelson Adams,* J 81-0416(B), Southern District of Mississippi. USAA's Complaint for Declaratory Judgment filed 8/27/81. Answer and Counterclaim filed 10/13/81. USAA's Answer to Counterclaim filed 11/13/81. Final judgment that homeowner's policy was void and USAA not liable to the defendant filed 4/18/84. Counterclaim dismissed with prejudice 4/18/84.

Case #116: *Austin W. Kiefer v. Thomas I. Magill, United Services Automobile Association, and Allstate Insurance Company,* J 83-973, Middle District of Louisiana; J. 83-0812(B), Southern District of Mississippi. Complaint filed 9/8/83. Case Transferred 11/3/83. USAA's Answer filed

12/7/83. Judgment of Dismissal Without Prejudice as to USAA 3/23/84. Final judgment of Dismissal With Prejudice 4/13/84.

Case #117: *United Services Automobile Association v. Robert W. Weston, et al.*, 84-C-112, District of Colorado. USAA's Complaint for Declaratory Judgment filed 1/13/84. USAA alleged that it was a Texas corporation and that there was diversity of citizenship between the parties. USAA's Motion Seeking Issuance of Injunction Staying State Action filed 1/13/84. Order Dismissing USAA's Complaint on the grounds that the alternative state remedy would be more efficacious 2/3/84.

Case #118: *Frederick O. Janssen v. United Services Automobile Association*, S 83-0387(N), Southern District of Mississippi. Complaint for breach of insurance contract filed 5/10/83. USAA's Motion to Dismiss for lack of *in personam* jurisdiction or in the alternative to transfer filed 6/13/83. Amended Motion to Dismiss 9/8/83. Motion granted for lack of in personam jurisdiction 10/14/83. Court ruled that it had no authority to transfer. Order of Dismissal 2/2/84.

V. The following 53 cases were filed, or remained opened, after the Second Circuit's decision in *Baer* on 6/27/74, which held that USAA as an unincorporated association could not be involved in diversity litigation, but which were closed before the decision in *Neil*:

Case #119: *Paul Silverstein v. United Services Automobile Association*, CIV-83-2166-E, Western District of Oklahoma. Complaint for bad faith breach of insurance policy filed 9/7/83. USAA was alleged to be a Texas corporation and it was alleged that there was diversity of citizenship

between the parties. USAA's Answer filed 9/27/83, admitted the diversity of citizenship, but alleged that USAA was a reciprocal insurance exchange. Pre-Trial Conference Memo filed by both parties 12/20/83. Stipulation for Order of Dismissal filed 1/16/84. Order of Dismissal 1/23/84.

Case #120: *James R. Daniel and United Services Automobile Association v. Dart Transit Company and Jimmy Greenfield, Jr.*, LR-C-83-0845, Eastern District of Arkansas. Complaint filed 9/29/83. USAA's Motion to Intervene for Purpose of Subrogation filed 1/5/84. USAA's Complaint in Intervention filed 1/16/84. The case was settled and dismissed 1/20/84.

Case #121: *Bituminous Fire & Marine Insurance Co. v. The Novogroder Companies, Inc., et al, and United Services Automobile Association*, 83-626-C, Southern District of Indiana. Complaint for breach of insurance contract and interpleader filed 5/3/83. USAA was alleged to be a Texas corporation and diversity of citizenship was alleged to exist. USAA's Answer filed 6/8/83. USAA admitted the truth of those allegations. USAA's Cross-Claim filed 8/1/83. USAA alleged it was a Texas corporation and that diversity of citizenship existed. Stipulation of Dismissal filed 12/30/83. Dismissal 1/4/84.

Case #122: *Suzanne Kahn v. United Services Automobile Association*, 81-1590D(4), Eastern District of Louisiana. Complaint for bad faith breach of insurance contract filed 4/22/81. Supplemental Amended Complaint filed 6/2/81. USAA's Answer filed 9/25/81. USAA's Motion to Dismiss on grounds of res judicata and failure to state a claim filed 11/18/81. USAA's Motion

granted 9/28/83. Plaintiff's Notice of Appeal filed 10/6/83. Judgment affirmed by Fifth Circuit 2/21/84.

Case #123: *The Estate of Mary Helen Stainkamp v. United Services Automobile Association,* 83-CIV-83-2959-E, Western District of Oklahoma. Complaint for breach of uninsured motorist policy filed 11/30/83. USAA was alleged to be an insurance company organized under the laws of the State of Texas. USAA's Answer filed 12/20/83. Stipulation for Order of Dismissal filed 12/29/83. Order of Dismissal 12/30/83.

Case #124: *Lucile McLand v. United Services Automobile Association,* H-82-0160(R), Southern District of Mississippi USAA's Petition for Removal filed 8/31/82. State Court Claim for uninsured motorist coverage. USAA's Answer filed 9/30/82. Pre-Trial 7/22/83. Final judgment dismissing case with prejudice 12/19/83.

Case #125: *United Services Automobile Association v. Sandra West, et al.,* 83-0053-K, Southern District of California. USAA's Complaint in Interpleader filed 1/6/83. Order Confirming Settlement filed 9/20/83.

Case #126: *Clotilde Gomez and Rafael Gomez v. Terrence L. Stubbs and United Services Automobile Association,* 82-5460K(3), Eastern District of Louisiana. Complaint filed 11/29/82. Answer filed 1/27/83. Order dismissing case for lack of prosecution 9/16/83. Joint Stipulation of Dismissal and Order dismissing case without prejudice 10/3/83.

Case #127: *United Services Automobile Association v. Charles Anderson, et al.,* J 83-0199(R), Southern District of Mississippi. Complaint for

Interpleader filed 3/16/83. Judgment for disbursement of funds 5/4/83.

Case #128: *David Lyle Jolkovsky, et al. v. White Fleet Cabs, Inc., et al., and United Services Automobile Association,* 81-4070, Eastern District of Louisiana. Complaint filed 10/9/81. USAA was alleged to be a foreign corporation. USAA's Answer filed 3/8/82. Settled and dismissed with prejudice 4/25/83.

Case #129: *United Services Automobile Association v. Allied Van Lines, Inc., and Wayne Agamie,* B 81-1941, District of Maryland. Petition for Removal filed 7/31/81. Case remanded to state court 4/25/83.

Case #130: *Estate of Diana Lynn Shine v. United Services Automobile Association,* S 79-0180(N), Southern District of Mississippi. Complaint for breach of uninsured motorist policy filed 5/14/79. USAA's Answer filed 5/25/79. Cause dismissed with prejudice 3/24/83.

Case #131: *Maria Travares v. United Services Automobile Association, et al.,* 82-0917-E, Southern District of California. Complaint for Declaratory Judgment filed 8/2/82. USAA's Answer filed 11/4/82. USAA's Motion for Dismissal filed 11/2/82. USAA's Motion granted and case dismissed for lack of subject matter jurisdiction on 2/16/83.

Case #132: *Christopher Gunn Haydon v. United Services Automobile Association,* 81-K-1434, District of Colorado. USAA's Petition for Removal filed 8/12/81. USAA alleged it was an interinsurance reciprocal exchange. Stipulation for Dismissal filed 1/26/83. Dismissed with prejudice 1/6/83.

Case #133: *United Services Automobile Association v. American Van & Storage, Inc.*, 80-2199(D), Eastern District of Louisiana. Complaint filed 6/13/80. USAA's Motion and Order of Dismissal 12/3/82.

Case #134: *Estate of Diana Lynn Shine v. United Services Automobile Association*, S 79-0125(C), Southern District of Mississippi. Complaint filed 3/20/79. USAA's Answer filed 5/21/79. Amended Complaint 7/27/79. USAA's Answer 8/13/79. Jury verdict for Plaintiff 3/10/81. Judgment 3/19/81. USAA's Motion for Judgment Notwithstanding the Verdict or alternatively a new trial filed 3/19/81. USAA's Motion denied 5/15/81. USAA's Notice of Appeal filed 5/27/81. USAA's Motion for Order Granting Stay filed 5/27/81. Granted 6/2/81. Judgment affirmed by Fifth Circuit on 8/10/82. Judgment ordering final distribution and cancellation of judgment 9/7/82.

Case #135: *United Services Automobile Association v. Wesley G. Dubose, et al.*, S 78-0074(C), Southern District of Mississippi. USAA's Complaint for Declaratory Judgment filed 3/21/78. USAA's Motion for Preliminary Injunction staying state court proceedings filed 4/4/78. Order sustaining USAA's Motion 5/18/78. Judgment against USAA 3/12/79. USAA's Notice of Appeal filed 4/4/79. Opinion and Mandate from Fifth Circuit affirming judgment filed 11/9/79.

Case #136: *Southern Home Insurance Company v. Johnny Hughes, Jr., et al., and United Services Automobile Association*, CV-482-68, Southern District of Georgia. Complaint for Declaratory Judgment

filed 2/17/82. USAA's Answer filed 3/12/82. Case dismissed with prejudice 7/20/82.

Case #137: *Kenneth W. Rockett v. United Services Automobile Association,* J 81-0538(R), Southern District of Mississippi. USAA's Petition for Removal filed 11/16/81. Judgment of Dismissal with Prejudice 6/10/82.

Case #138: *Loyd K. Thomas and Gayle M. Thomas v. United Services Automobile Association,* 81-416-C, Eastern District of Oklahoma. USAA's Petition for Removal filed 10/26/81. Stipulation and Order of Dismissal 6/30/82.

Case #139: *Daniel R. Walley Sr., v. United Services Automobile Association, et al.,* H 79-0136(R), Southern District of Mississippi. USAA's Petition for Removal filed 8/31/79. USAA alleged that it was a reciprocal interinsurance exchange and that there was diversity of citizenship. USAA's Answer and Cross-Claim filed 9/21/79. Order of Dismissal 5/6/81. USAA's Amended Cross-Claim filed 5/18/81. Judgment of Dismissal with Prejudice on 4/29/82.

Case #140: *A. Frederick C. Hakkinen v. United Services Automobile Association,* 81-953, District of Oregon. Complaint for Declaratory Judgment filed 10/13/81. USAA was alleged to be a Texas corporation. USAA's Answer filed 11/5/81, admitted the truth of that allegation. USAA's Motion for Summary Judgment for interpretation of the policy filed 12/9/81. Case dismissed with prejudice for lack of jurisdiction 1/8/82. Judgment corrected to dismissal without prejudice for lack of jurisdiction 1/22/82.

Case #141: *Margaret Mullahy v. United States Services Automobile Association, et al.,* 80-4942-K,

Eastern District of Louisiana. Complaint filed 12/16/80. USAA's Answer filed 4/3/81. Sixty Day Order of Dismissal 4/7/82. Case dismissed with prejudice 4/30/82.

Case #142: *Franklin E. Smith, Sr. v. Earl J. Ortiz, et al., and United Services Automobile Association,* 79-CV-327, Northern District of New York; 80-1761, Middle District of Louisiana. Complaint filed 5/17/79. USAA's Motion to Dismiss and Transfer Venue filed 7/30/79. Granted 11/7/79. Transferred 11/17/80. Order dismissing case with prejudice 6/11/81.

Case #143: *United Services Automobile Association v. Universal Carloading and Distributing Co.,* 80-1098-2, District of South Carolina. Petition for Removal filed 6/9/80. Case settled 3/31/81. Order of Dismissal With Prejudice 4/15/81.

Case #144: *Anna Marie Shaddinger, et al., v. Bryan M. Gowland, et al. and United Services Automobile Association,* 78-4264, Eastern District of Louisiana. Complaint filed 12/28/78. USAA's Answer filed 4/6/79. jury verdict for defendants 4/10/81. Judgment 4/21/81.

Case #145: *Ramon Feliciano, et al., v. United Services Automobile Association,* 78-2464, District of Puerto Rico. Complaint filed 12/12/78. Judgment for USAA 3/19/80. Notice of Appeal filed 4/18/80. Judgment affirmed by First Circuit on 4/8/81. 646 F.2d 695. Mandate 4/29/81.

Case #146: *Paul W. Johnson v. Morris V. Blystone and United Services Automobile Association,* H-80-2243, Southern District of Texas. Complaint filed 4/6/80. USAA's Motion to Dismiss filed 10/22/80. Motion granted 3/23/81.

Case #147: *Dan H. Singley, Jr., v. United Services Automobile Association,* J 80-0114(N), Southern District of Mississippi. USAA's Petition for Removal of breach of uninsured motorist claim filed 3/5/80. Settled and dismissed 2/4/81.

Case #148: *United Services Automobile Association v. James H. Diggs and Patricia J. Diggs,* 79-3001, Western District of Arkansas. USAA's Complaint for Declaratory Judgment filed 1/9/79. Counterclaim filed 8/31/79. USAA's Reply 9/10/79. Stipulation for Dismissal 12/16/79. Order of Dismissal 12/17/79.

Case #149: *John R. Rhodes, Jr., v. Jay Sanford Parrott, and United Services Automobile Association,* 78-580-D, Eastern District of Louisiana. Complaint filed 2/21/78. USAA's Answer filed 5/23/78. USAA's Motion to Dismiss filed 9/9/80. Judgment in favor of defendants 11/7/80.

Case #150: *Robert J. Byrd v. Robert Corneal and United Services Automobile Association,* 79-2826-H, Eastern District of Louisiana. Complaint filed 7/19/79. USAA was alleged to be a foreign insurance company and there was alleged to be diversity of citizenship between the parties. USAA's Answer filed 9/10/79, alleged lack of jurisdiction over the subject matter because diversity of citizenship did not exist. The Defendants' Motion to Dismiss filed 10/2/79, alleged that the Defendant, Robert Corneal, was a citizen of the State of Louisiana, and that diversity of citizenship did not exist between that Defendant and the Plaintiff. Defendant's Motion to Dismiss granted without opposition 10/23/80.

Case #151: *William Todd Gould v. Jeremy Y. Kleinberger and United Services Automobile Association*, 79-3495-J, Eastern District of Louisiana. Complaint filed 9/10/79. USAA's Answer filed 11/28/79. Order of Sixty Day Dismissal filed 6/23/80. Case dismissed with prejudice 7/25/80.

Case #152: *Jack E. Russell and Great American Insurance Co. v. United Services Automobile Association*, NC-78-0108, District of Utah. Complaint filed 12/8/78. USAA's Answer filed 1/19/79. Pre-Trial Order filed 12/27/79. Stipulation and Order of Dismissal filed 1/23/80.

Case #153: *Lewis A. Whitten v. United Services Automobile Association*, 78-248-C, Eastern District of Oklahoma. USAA's Petition for Removal filed 8/10/78. Pre-Trial Conference Memorandum 10/19/79. Order transferring case from Judge Cook to Judge Seay 11/21/79. Whitten's motion to Dismiss 12/19/79. USAA's Response 12/20/79. Order granting Whitten's Motion to Dismiss Without Prejudice 1/7/80.

Case #154: *George G. Villere, as Administrator of the Estate of his minor child, Christopher Villere v. United Services Automobile Association*, 79-1104-K, Eastern District of Louisiana. Complaint filed 3/26/79. USAA's Answer filed 5/25/79. Case dismissed with prejudice 11/20/79.

Case #155: *Katherine Blair v. United Services Automobile Association*, 79-67, Middle District of Pennsylvania. Complaint filed 1/16/79. USAA's Answer 2/7/79. Stipulation and Dismissal 10/2/79.

Case #156: *Syble Long and Glenn Long v. Ken H. Phillips, Katheryn L. Nutt and United Services*

Automobile Association, 77-1536-B, Eastern District of Louisiana. Complaint filed 5/17/77. USAA's Answer 7/15/77. Plaintiffs' Motion and Order of Dismissal with Prejudice 9/13/79.

Case #157: *Carolina Casualty Insurance Company v. Sheradon K. Hawks, et al., and United Services Automobile Association*, S 78-0021(N), Southern District of Mississippi. Complaint for Interpleader filed 1/26/78. USAA's Answer filed 3/1/78. USAA's Amended Answer 3/15/78. Summary Judgment 7/5/78. Case closed 7/17/79.

Case #158: *Lumbermen's Mutual Casualty Co. v. John R. Janack, et al., and United Services Automobile Association*, CV-477-245, Southern District of Georgia. Complaint for Declaratory Judgment filed 11/4/77. USAA's Answer filed 11/20/77. Summary Judgment for Plaintiff 2/20/77.

Case #159: *United Services Automobile Association v. Mark R. Staiger*, H-76-467, District of Connecticut. Complaint for Declaratory Judgment filed 12/2/76. Stipulation of Dismissal 4/3/78.

Case #160: *American Empire Insurance Co., United Services Automobile Association, and State Farm Fire & Casualty Co. v. ITT General Controls, Inc., et al.*, 76-F-281, District of Colorado. Complaint filed 3/11/76. USAA alleged that it was a Texas corporation and that there was diversity of citizenship. Amended Complaint filed 9/14/77. USAA again alleged it was a Texas corporation. Stipulation and Dismissal 3/6/78.

Case #161: *United Services Automobile Association v. Germantown Savings Bank, et al.*, 78-64, Eastern District of Pennsylvania. Complaint for

Interpleader filed 1/9/78. Memorandum Opinion 4/19/78. 449 F. Supp. 901.

Case #162: *Myrtle Baird v. United Services Automobile Association*, CV-177-35, Southern District of Georgia. Complaint filed 3/1/77. USAA's Answer filed 3/24/77. USAA's Motion to Dismiss filed 3/24/77. USAA's Motion for Order Compelling Plaintiff to make election between lawsuits filed 3/24/77. USAA's Motion for Summary Judgment 10/17/77. Granted 11/14/77. Baird's Motion for Reconsideration 12/14/77. Denied 1/11/78. Notice of Appeal 2/14/78. Baird's Voluntary Dismissal of Notice of Appeal 2/28/78.

Case #163: *Michael Jerome Williams by Myrtle Baird v. United Services Automobile Association*, CV-177-34, Southern District of Georgia. Complaint filed 3/1/77. USAA's Answer and Motion to Dismiss filed 3/24/77. USAA's Motion for Summary Judgment filed 10/17/77. Granted 11/14/77. Plaintiffs' Motion for Reconsideration filed 12/14/77. Denied 1/11/78. Notice of Appeal filed 2/14/78. Plaintiffs' Voluntary Dismissal of Notice of Appeal 2/28/78.

Case #164: *United Services Automobile Association v. Frank D. Middleton, et al.*, C 76-112R, Northern District of Georgia. USAA's Complaint for Declaratory Judgment filed in 1976. USAA's Motion for Summary Judgment denied 2/9/78. 77 F.R.D. 660.

Case #165: *United Services Automobile Association v. Josef F. Zimmerman and Eugene V. Stewart*, 75 C-2198, Eastern District of New York. USAA's Complaint for Declaratory Judgment filed 12/31/75. USAA's Motion for Summary Judgment filed 4/11/77. Granted 8/18/77.

Case #166: *Myrtle Baird v. Michael Jerome Williams and United Services Automobile Association,* CV175-36, Southern District of Georgia. Garnishment Summons filed 3/26/75. USAA's Answer filed 5/9/75. USAA's Motion to Dismiss filed 5/9/75. USAA's Motion for Summary Judgment filed 2/27/76. USAA's Motion for Summary Judgment granted 3/26/76. Order vacated and USAA's Motion denied 7/16/76. USAA's Second Motion for Summary Judgment filed 8/16/76. Baird's Motion for Voluntary Dismissal 3/3/77.

Case #167: *Martha A. O'Keefe v. Rufus A. Marbury, et al., and United Services Automobile Association,* H 75-864, District of Maryland. Complaint filed 6/27/75. USAA's Answer filed 12/1/75. Stipulation and Order dismissing with prejudice 5/6/77.

Case #168: *United Services Automobile Association v. John M. Vissotzky, et al.,* C-76-324, Eastern District of Washington. USAA's Complaint for Declaratory Judgment filed 12/30/76. Stipulation for Dismissal 3/21/77.

Case #169: *United Services Automobile Association and David G. Humphrey v. Glens Falls Insurance Company,* 14689, District of Connecticut. USAA's Complaint filed 10/26/71. Answer and Cross-Claim filed 1/29/73. USAA Reply and Answer to Cross-Claims. Judgment for Glens Falls against USAA. 429 F. Supp. 101. USAA's Notice of Appeal filed 10/4/76. Judgment affirmed by Second Circuit filed 3/24/76.

Case #170: *James A. O'Conner v. Dorthy D. Terry and United Services Automobile Association,* 75-1367E(B), Eastern District of Louisiana. Complaint filed 5/6/75. USAA's Motion to Dismiss

for absence of diversity of citizenship filed 4/21/76. Granted without opposition 7/16/76.

Case #171: *United Services Automobile Association v. Linda D. Lour Johnson and Leroy D. Johnson,* 74-87-C6, District of Kansas. USAA's Complaint filed 5/8/74. USAA alleged it was a reciprocal insurance association. USAA's Motion for Default Judgment filed 6/20/74. Journal Entry of Judgment 7/18/74.

EXHIBIT "B"

LIST OF CASES REMOVED BY
USAA TO FEDERAL COURT

(1) Cases active after the *Tuck* decision of *10/14/88*:

Case #4: *Stout v. USAA,* Mid. La., 9/88 – 1/90
Case #8: *Liles v. USAA,* Northern Miss., 11/86 – 10/89
Case #9: *Eason v. USAA, Northern Geo., 3/89 – 6/89*
Case #15: Patton v. USAA, Western La., 8/87 – 3/89

(2) Cases active after the Claims Department Bulletin dated *5/2/88*:

Case #24: *Dulock v. USAA,* Northern Geo., 7/87 – 9/88
Case #27: *McGuire v. USAA,* Nevada, 8/87 – 8/88
Case #30: *Liles v. USAA,* Northern Miss., 11/86 – 5/88

(3) Cases active after Motion to Dismiss in *Tuck* of *4/15/86*:

Case #41: *Barnes v. USAA*, Eastern Ark., 11/87 – 1/88
Case #43: *List v. USAA*, Hawaii, 3/87 – 11/87
Case #44: *Moore v. USAA*, Southern Miss., 2/85 – 10/87
Case #45: *Edwards v. USAA*, Southern Miss., 9/87 – 9/87
Case #48: *Bradley v. USAA*, Hawaii, 3/87 – 8/87
Case #55: *McCorkle v. USAA*, Southern Ill., 8/85 – 6/87
Case #57: *Rogers v. USAA*, Northern Geo., 10/86 – 5/87
Case #63: *Fletcher v. USAA*, Western La., 4/85 – 12/86
Case #65: *Schramm v. USAA*, Western Penn., 12/85 – 11/86
Case #72: *Pridgen v. USAA*, Middle Geo., 11/84 – 4/86

(4) Cases active after the *Neil* decision of *2/15/84*:

Case #81: *Shaw v. USAA*, Hawaii, 8/85 – 1/86
Case #82: *Ryan v. USAA*, Eastern La., 11/84 – 11/85
Case #85: *Cohen v. USAA*, Middle Geo., 4/85 – 12/85
Case #96: *Commercial Union v. USAA*, Colo., 11/84 – 5/85
Case #107: *Smith v. USAA*, S. Carolina, 3/84 – 10/84
Case #108: *Bozardt v. USAA*, Northern Geo., 11/82 – 9/84
Case #109: *Spiess v. USAA*, Alaska, 12/83 – 6/84
Case #114: *Frazier v. USAA*, Northern Geo., 11/82 – 6/84

(5) Cases active after the *Baer* decision of *6/27/74:*

Case #132: *Haydon v. USAA,* Colorado, 8/81 – 1/83
Case #137: *Rockett v. USAA,* Southern Miss., 11/81 – 6/82
Case #138: *Thomas v. USAA,* Eastern Okla., 10/81 – 6/82
Case #139: *Walley v. USAA,* Southern Miss., 8/79 – 4/82
Case #147: *Singley v. USAA,* Southern Miss., 3/80 – 2/81
Case #153: *Whitten v. USAA,* Eastern Okla., 8/78 – 1/80

EXHIBIT "C"

LIST OF CASES FILED BY USAA IN FEDERAL COURT

Note: Includes cases where USAA intervened as Plaintiff (*) or was named as real party in interest by the Defendant (•).

(1) Cases after the *Tuck* decision of *10/14/88*:

Case #1: *USAA v. Arey,* Western Virg., 7/89 – open
Case #3: *USAA v. Barger,* Northern Ohio, 11/88 – 8/90
Case #7: *USAA v. Hawaiian Ins.,* Hawaii, 11/84 – 11/89
Case #12: *USAA v. Evangelista,* E. Penn., 11/87 – 4/89

(2) Cases active after the Claims Department Bulletin dated *5/2/88*:

Case #23: *USAA v. Jeser,* New Jersey, 5/88 – 9/88
Case #25: *USAA v. Fugua Ind.,* Western Okla., 6/86 – 9/88
Case #26: *USAA v. Weappa,* Northern Ala., 2/86 – 9/88

Case #28: *USAA v. Burlinson* [sic], Northern Geo., 7/88 – 7/88
Case #31: *USAA v. Stryker,* Southern Calif., 11/86 – 5/88
Case #33: *USAA v. Vaughn,* Northern Miss., 1/86 – 5/88

(3) Cases active after the Motion to Dismiss in *Tuck* of *4/15/86*:

•Case #38: *USAA v. Rollins Protect.,* E. Virg., 7/81 – 2/88
Case #50: *USAA v. Krieger,* Northern Geo., 7/86 – 7/87
Case #52: *USAA v. Cregor,* Northern Ill., 4/85 – 7/87
Case #62: *USAA v. Guzman,* Western Wash., 4/85 – 1/87
Case #67: *USAA v. Ah Moo,* Hawaii, 6/85 – 8/86
Case #71: *USAA v. Rickerson,* North. Calif., 5/85 – 4/86
Case #74: *USAA v. General Electric,* Conn., 11/83 – 4/86

(4) Cases active after the *Neil* decision of *2/15/84*:

Case #86: *USAA v. Sandholm,* Northern Okla., 2/85 – 12/85
Case #88: *USAA v. Massey,* Southern Miss., 5/85 – 11/85
Case #92: *USAA v. McCorkle,* Southern Ill., 6/85 – 8/85
Case #94: *USAA v. Stinson,* Southern Calif., 1/85 – 7/85
Case #97: *USAA v. Kramer Chemical,* E. N.Y., 7/80 – 4/85
Case #98: *USAA v. Robelen,* Western Okla., 5/84 – 3/85
Case #104: *USAA v. Foster,* Middle Fla., 7/84 – 11/84

Case #105: *USAA v. Brown*, Southern Calif., 6/84 – 10/84

Case #115: *USAA v. Adams*, Southern Miss., 5/83 – 2/84

Case #117: *USAA v. Weston*, Colorado, 1/84 – 2/84

(5) Cases active after the *Baer* decision of 6/27/74:

*Case #120: *USAA v. Dart*, Eastern Ark., 9/83 – 1/84

Case #125: *USAA v. West*, Southern Calif., 1/83 – 10/83

Case #127: *USAA v. Anderson*, Southern Miss., 3/83 – 5/83

Case #133: *USAA v. American Van*, East La., 6/80 – 12/82

Case #135: *USAA v. Dubose*, Southern Miss., 3/78 – 8/82

Case #148: *USAA v. Diggs*, Western Ark., 1/79 – 12/80

Case #159: *USAA v. Staiger*, Connecticut, 11/76 – 4/78

Case #160: *USAA v. ITT Gen.*, Colorado, 3/76 – 3/78

Case #161: *USAA v. Germantown Sav.*, E. Penn., 1/78 – 2/78

Case #164: *USAA v. Middleton*, Northern Geo., '76 – 2/78

Case #165: *USAA v. Zimmerman*, Eastern N.Y., 12/75 – 8/77

Case #168: *USAA v. Vissotzky*, Eastern Wash., 12/76 – 3/77

Case #169: *USAA v. Glens Falls Ins.*, Conn., 10/71 – 3/77

Case #171: *USAA v. Johnson*, Kansas, 5/74 – 7/74

EXHIBIT "D"

LIST OF CASES FILED AGAINST USAA AS DEFENDANT IN FEDERAL COURT

Note: Includes cases in which USAA intervened as Defendant (*) or in which USAA filed a counterclaim or cross-claim (•).

(1) Cases active after the *Tuck* decision of *10/14/88*:

Case #2: *Ins. Co. of Penn. v. USAA*, Nevada, 5/89 – open
*•Case #5: *Pacific Int'l v. USAA*, Hawaii, 3/89 – 11/89
Case #10: *Mucha v. USAA*, Southern Miss., 9/87 – 5/89
Case #11: *Smith v. USAA*, E. Missouri, 2/88 – 4/89
Case #13: *Herrmann v. USAA*, Western Texas, 3/87 – 4/89
Case #16: *Dennis v. USAA*, Western Okla., 11/88 – 1/89
Case #17: *Lovelace v. USAA*, Western Okla., 7/88 – 1/89
Case #18: *Hartford Ins. v. USAA*, N. Geo., 2/88 – 1/89
Case #19: *Morillas v. USAA*, Western La., 8/88 – 12/88
Case #20: *Porter v. USAA*, Northern Ala., 2/88 – 12/88
Case #21: *Integrity Ins. v. USAA*, M. Tenn., 1/87 – 11/88
Case #22: *O'Brien v. USAA*, Northern Geo., 5/88 – 10/88

(2) Cases active after the Claims Department Bulletin dated *5/2/88*:

*Case #29: *Maloney v. USAA, Maryland*, 8/88 – 5/88
Case #32: *Vazquez v. USAA*, Puerto Rico, 5/86 – 5/88

Case #34: *Vaughn v. USAA*, Northern Miss., 12/84 – 5/88
Case #35: *Vaughn v. USAA*, Northern Miss., 12/84 – 5/88
Case #36: *Vaughn v. USAA*, Northern Miss., 12/84 – 5/88

(3) Cases active after the Motion to Dismiss in *Tuck* of *4/15/86*:

Case #37: *Breland v. USAA*, Eastern Virg., 2/88 – 3/88
Case #39: *Saunders v. USAA*, Southern Miss., 9/85 – 2/88
Case #40: *Hoffman v. USAA*, Connecticut, 7/82 – 1/88
Case #42: *Holiday v. USAA*, Western Wash., 9/87 – 11/87
Case #46: *Aetna Casualty v. USAA*, E. Penn., 9/86 – 9/87
Case #47: *Markland v. USAA*, Northern Ind., 12/85 – 9/87
Case #49: *Bradley v. USAA*, Hawaii, 2/87 – 8/87
Case #51: *Cregor v. USAA*, Hawaii, N. Ill., 6/85 – 7/87
Case #53: *Woodside v. USAA*, Eastern La. 2/87 – 6/87
•Case #54: *Goldman v. USAA*, Northern Geo, 4/86 – 6/87
Case #55: *Behl v. USAA*, Middle Fla., 4/87 – 5/87
Case #58: *Moore v. USAA*, Southern Miss., 5/84 – 4/87
Case #59: *Elder v. USAA*, Eastern La., 12/85 – 2/87
Case #60: *Choate v. USAA*, Western Okla., 10/85 – 2/87
Case #61: *Oss v. USAA*, Western Texas, 1/85 – 2/87
Case #64: *Wunder v. USAA*, Southern Miss. 12/85 – 11/86

Case #66: *Horn v. USAA*, Nevada, 12/85 – 10/86
Case #68: *Dicesara v. USAA*, Eastern Virg., 5/86 – 7/86
Case #69: *Brooks v. USAA*, Western Okla., 4/86 – 7/86
Case #70: *Wheeler v. USAA*, Minnesota, 3/85 – 5/86
Case #73: *Ruth v. USAA*, Western Okla., 4/85 – 4/86

(4) Cases active after the *Neil* decision of *2/15/84*:

Case #75: *Wong v. USAA*, Rhode Island, 12/85 – 3/86
Case #76: *Oliney v. USAA*, Eastern La., 11/85 – 3/86
Case #77: *Stephens v. USAA*, Western Okla., 9/85 – 3/86
Case #78: *Brignon v. USAA*, Western Ark., 3/85 – 3/86
Case #79: *Healey v. USAA*, Connecticut, 9/85 – 2/86
Case #80: *Ondre v. USAA*, Middle Fla., 11/85 – 1/86
Case #83: *Conrad v. USAA*, Mid. Tenn., 11/85 – 12/85
Case #84: *Quinn v. USAA*, Vermont, 7/85 – 12/85
Case #87: *Boardman v. USAA*, South. Miss., 5/81 – 12/85
Case #89: *Oliney v. USAA*, Eastern La., 8/84 – 11/85
Case #90: *Holcomb v. USAA*, Northern Okla., 7/85 – 8/85
Case #91: *Webb v. USAA*, Eastern Virg., 6/85 – 8/85
Case #93: *Wolniewicz v. USAA*, East. La., 4/82 – 8/85
Case #95: *Grader v. USAA*, Kansas, 8/83 – 8/85
Case #99: *Carter v. USAA*, Eastern La., 12/83 – 2/85
Case #100: *King v. USAA*, New Jersey, 11/82 – 2/85
Case #101: *Lumbermen's v. USAA*, New Jersey, 8/84 – 1/85

Case #102: *Viboud Ruiloba v. USAA*, P.R., 9/83 – 12/84
Case #103: *Oliney v. USAA*, Eastern La., 9/82 – 12/84
Case #106: *Pauley v. USAA*, Southern Miss., 5/84 – 10/84
Case #110: *Isbell v. USAA*, Eastern La., 11/83 – 6/84
Case #111: *Hughes v. USAA*, Western Okla., 11/83 – 6/84
Case #112: *Horban v. USAA*, Western Okla., 8/83 – 6/84
Case #113: *Buchholz v. USAA*, Northern Miss., 8/83 – 6/84
Case #116: *Kiefer v. USAA*, Mid. La./S. Miss., 9/83 – 4/84
Case #118: *Janssen v. USAA*, Southern Miss., 5/83 – 2/84

(5) Cases active after the *Baer* decision of *6/27/74*:

Case #119: *Silverstein v. USAA*, West. Okla., 9/83 – 1/84
•Case #121: *Bituminous Fire v. USAA*, S. Ind., 5/83 – 1/84
Case #122: *Kahn v. USAA*, Eastern La., 4/81 – 1/84
Case #123: *Steinkamp v. USAA*, West. Okla., 11/83 – 12/83
Case #124: *McLand v. USAA*, Southern Miss., 8/82 – 12/83
Case #126: *Gomez v. USAA*, Eastern La., 11/84 – 10/83
Case #128: *Jolkovsky v. USAA*, Eastern La., 10/81 – 4/83
Case #130: *Shine v. USAA*, Southern Miss., 5/79 – 3/83
Case #131: *Traveres v. USAA*, Southern Calif., 8/82 – 2/83

Case #134: *Shine v. USAA*, Southern Miss., 3/79 – 9/82
Case #136: *Southern Home v. USAA*, S. Geo., 2/82 – 7/82
Case #140: *Hakkinen v. USAA*, Oregon, 10/81 – 1/82
Case #141: *Mullahy v. USAA*, Eastern La., 12/80 – 1/82
Case #142: *Smith v. USAA*, No. N.Y./Mid. La., 5/79 – 6/81
Case #144: *Shaddinger v. USAA*, East. La., 12/78 – 4/81
Case #145: *Felicino v. USAA*, Puerto Rico, '78 – 4/81
Case #146: *Johnson v. USAA*, Southern Texas, 10/80 – 3/81
Case #149: *Rhodes v. USAA*, Eastern La., 2/78 – 11/80
Case #150: *Byrd v. USAA*, Eastern La., 7/79 – 10/80
Case #151: *Gould v. USAA*, Eastern La., 9/79 – 6/80
Case #152: *Russell v. USAA*, Utah, 12/78 – 1/80
Case #154: *Villere v. USAA*, Eastern La., 3/79 – 11/79
Case #155: *Blair v. USAA*, Middle Penn., 1/79 – 10/79
Case #156: *Long v. USAA*, Eastern La., 5/77 – 9/79
Case #157: *Carolina Casualty v. USAA*, 1/78 – 7/79
Case #158: *Lumbermen's v. USAA*, South. Geo., 11/79 – 2/79
Case #162: *Baird v. USAA*, Southern Geo., 3/77 – 2/78
Case #163: *Williams v. USAA*, Southern Geo., 3/77 – 2/78
Case #166: *Baird v. USAA*, Southern Geo., 3/75 – 3/77
Case #167: *O'Keefe v. USAA*, Maryland, 6/75 – 5/77
Case #170: *O'Conner v. USAA*, Eastern La., 5/75 – 7/76

EXHIBIT "E"

LIST OF CASES FILED BY USAA IN STATE COURT AND REMOVED TO FEDERAL COURT BY THE DEFENDANT

(1) Cases active after the *Tuck* decision:

Case #14: *USAA v. Jelks*, East. N. Carolina, 10/88 – 3/89

(2) Cases active after the *Baer* decision:

Case #129: *USAA v. Allied Van*, Maryland, 7/81 – 4/83
Case #143: *USAA v. Univ. Carloading*, S.C. 6/80 – 4/81

EXHIBIT "F"

LIST OF CASES IN WHICH DIVERSITY ISSUE WAS RAISED

(1) Cases in which USAA was the party which had invoked federal jurisdiction:

Case #4: *Stout v. USAA*, Middle Louisiana, 9/88 – 1/90
Case #8: *Liles v. USAA*, Northern Miss., 11/86 – 11/89
Case #9: *Eason v. USAA*, Northern Geo., 3/89 – 6/89
Case #26: *USAA v. Weappa*, Northern Ala., 2/86 – 8/88
Case #48: *Bradley v. USAA*, Hawaii, 3/87 – 8/87
Case #72: *Pridgen v. USAA*, Middle Geo., 11/84 – 4/86

(2) Cases in which it was the party opposing USAA which had invoked federal jurisdiction:

Case #13: *Herrmann v. USAA*, Western Texas, 3/87 – 4/89
Case #14: *USAA v. Jelks*, Western Louisiana, 10/88 – 3/89
Case #16: *Dennis v. USAA*, Western Okla., 11/88 – 1/89
Case #17: *Lovelace v. USAA*, Western Okla., 7/88 – 1/89
Case #22: *O'Brien v. USAA*, Northern Geo., 5/88 – 10/88
Case #37: *Breland v. USAA*, Eastern Virg., 2/88 – 3/88
Case #42: *Holiday v. USAA*, Western Wash., 9/87 – 12/87
Case #68: *Dicesara v. USAA*, Eastern Virg., 5/86 – 7/86
Case #69: *Brooks v. USAA, Western Okla.*, 4/86 – 7/86
Case #73: *Ruth v. USAA*, Western Okla., 4/85 – 4/86
Case #84: *Quinn v. USAA*, Vermont, 7/85 – 12/85
Case #91: *Webb v. USAA*, Eastern Virg., 6/85 – 8/85
Case #131: *Travares v. USAA*, South. Calif., 8/82 – 2/83

(3) Cases in which it is unclear whether dismissal was based on USAA's status as an unincorporated association:

Case #56: *Behl v. USAA*, Middle Florida, 4/87 – 5/87
Case #83: *Conrad v. USAA*, Middle Tenn., 11/85 – 12/85
Case #101: *Lumbermen's Mutual v. USAA*, N.J., 8/84 – 1/85
Case #140: *Hakkinen v. USAA*, Oregon, 10/81 – 1/82

Case #170: *O'Conner v. USAA*, East. Louisiana, 5/75 – 7/76

EXHIBIT "G"

LIST OF JURISDICTIONS AFFECTED

(1) U.S. District Courts in which diversity cases involving USAA have been litigated:

(01) Northern District of Alabama
(02) District of Alaska
(03) Eastern District of Arkansas
(04) Western District of Arkansas
(05) Northern District of California
(06) Southern District of California
(07) District of Colorado
(08) District of Connecticut
(09) Middle District of Florida
(10) District of Kansas
(11) Western District of Kentucky
(12) District of Maryland
(13) District of Minnesota
(14) District of Mississippi
(15) Middle District of Georgia
(16) Northern District of Georgia
(17) Southern District of Georgia
(18) District of Hawaii
(19) Northern District of Illinois
(20) Southern District of Illinois
(21) Northern District of Indiana
(22) Southern District of Indiana
(23) Eastern District of Louisiana
(24) Middle District of Louisiana
(25) Western District of Louisiana
(26) District of Maryland

(27) Eastern District of Missouri
(28) Northern District of Mississippi
(29) Southern District of Mississippi
(30) District of Nevada
(31) District of New Jersey
(32) Eastern District of New York
(33) Northern District of New York
(34) Eastern District of North Carolina
(35) Northern District of Ohio
(36) Eastern District of Oklahoma
(37) Northern District of Oklahoma
(38) Western District of Oklahoma
(39) District of Oregon
(40) Eastern District of Pennsylvania
(41) Middle District of Pennsylvania
(42) Western District of Pennsylvania
(43) District of Puerto Rico
(44) District of Rhode Island
(45) District of South Carolina
(46) Middle District of Tennessee
(47) Southern District of Texas
(48) Western District of Texas
(49) District of Utah
(50) District of Vermont
(51) Eastern District of Virginia
(52) Western District of Virginia
(53) Eastern District of Washington
(54) Western District of Washington

(2) United States Courts of Appeals in which diversity cases involving USAA have been litigated:

(01) Third Circuit
(02) Fourth Circuit
(03) Fifth Circuit
(04) Sixth Circuit
(05) Ninth Circuit

EXHIBIT H

1ST CASE of Level 1 printed in FULL format.

GARY NEIL, Plaintiff V. UNITED SERVICE AUTOMOBILE ASSOCIATION, Defendant and Third-Party Plaintiff V. DEARBORN AUTO, INC., ET AL., Third-Party Defendants

Civil Action 83-2414-MA

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Slip Opinion
February 15, 1984

COUNSEL:

George F. gormley, [sic] esq., One Center Plaza, Boston, MA 02108, for Plaintiff

Gerald Blair, Avery, Dooley Post & Avery, 141 Tremont St., Boston, Ma. 02111, FOR DEARBORN AUTO, Philip J. McCarthy, Esq., LAW OFFICES OF PHILIP J. MC CARTHY, One Liberty Square Boston, Mass. 02109, FOR CREATIVE COACH WORKS, INC., John A. Maloney, Esq., LAW OFFICES OF LEONARD N. AUGELLO, 10 Post Office Square, Suite 1155, Boston, Mass. 02109, for Defendant

OPINION BY: MAZZONE

OPINION:

MEMORANDUM AND ORDER

MAZZONE, D.J.

Again, this matter is before the Court, this time on the defendant's motion to dismiss for lack of jurisdiction

over the subject matter. Fed.R.Civ.P. 12(b)(1). The factual background of the dispute is set out fully in my Memorandum and Order of September 30, 1983. The plaintiff, a citizen of Massachusetts, asserted jurisdiction founded on diversity of citizenship. 28 U.S.C. § 1332. In its present motion, the defendant claims that its legal status for purposes of establishing diversity of citizenship is that of an inter-insurance exchange association, and not a corporation. As such, the defendant claims its citizenship is determined by that of each of its members. There being a common citizenship between the plaintiff and thousands of the defendant's other members, the defendant moves this Court to dismiss for lack of jurisdiction.

The defendant is a reciprocal inter-insurance exchange. As cogently established by the Second Circuit in Baer v. United Services Automobile Association, 503 F.2d 393 (2d Cir. 1974), the defendant is an unincorporated association formed under Texas law and can not be considered a "corporation" for purposes of establishing diversity of citizenship. Citing Rosendale v. Phillips, 87 F.2d 454 (2d Cir. 1937) (per curiam), the Second Circuit noted: "For the purpose of determining whether diversity of citizenship exists, unincorporated associations have long been considered to be citizens of each and every state in which the association has members. Thus, if the unincorporated association party to a lawsuit has any member whose state citizenship coincides with the state citizenship of any of the opposing parties in the lawsuit, a federal district court has no diversity jurisdiction."

Slip Opinion

The Second Circuit also noted that under United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965), the formal distinction between the insurance reciprocal and the insurance corporation is dispositive on the issue of whether the reciprocal should be considered a corporation for diversity purposes, irrespective of whether the distinction is, as a practical matter, an artificial or illogical one. 503 F.2d at 395. The Second Circuit further commented that any trend toward erosion of the rule creating multiple state citizenship for unincorporated associations seems to have been halted abruptly by Bouligny. The Supreme Court in Bouligny acknowledged the significant similarity between corporations and certain other types of associations, but was unwilling to tamper with the existing statutory rule of 28 U.S.C. § 1332(c), which by its express terms applies only to corporations: "We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 U.S. at 150-51.

In view of the clear pronouncement of the Supreme Court in Bouligny, and the Second Circuit's cogent application of the law to this particular defendant in Baer, this Court finds the defendant to be an unincorporated association for the purposes of establishing diversity of citizenship. I cannot be persuaded by the plaintiff's attempts to enlarge the scope of 28 U.S.C. § 1332(c) to consider the defendant a corporation for jurisdictional purposes.

There being no evidence to dispute the defendant's averment that it has thousands of members residing in Massachusetts, this Court must find that there is no diversity of citizenship between the plaintiff and the defendant. Accordingly, the complaint against the defendant must be dismissed.

In so doing, however, I must comment that it would behoove the defendant to act promptly and consistently in challenging diversity jurisdiction over it in Federal court actions. In the past, the defendant has both sued and allowed itself to be sued in Federal court where jurisdiction was founded on diversity of citizenship, without challenging jurisdiction as it does in this present motion. See Feliciano v. United Services Automobile Association, 646 F.2d 695 (1st Cir. 1981); United Services Automobile Association v. Glens Falls Insurance Company, 429 F.Supp. 101 (D.Conn. 1976); United Services Automobile Association v. Middleton, 77 F.R.D. 660 (N.D.Ga. 1978). Selective challenges to jurisdiction bespeak a self-serving abuse of the Federal court processes. Such tactics are particularly odious since subject matter jurisdiction is not a matter that can be created by laches, waiver or estoppel. See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21 (1978); Page v. Wright, 116 F.2d 449 (7th Cir. 1940). Had the defendant acted promptly in challenging jurisdiction, substantial expense and effort to the plaintiff, as well as to the third-party defendants, would have been avoided.

Finally, because the defendant/third-party plaintiff was not properly subject to this Court's jurisdiction, the defendant/third-party plaintiff's complaint must also be

dismissed as having been brought without this Court's jurisdiction. Fed.R.Civ.P. 14(a).

SO ORDERED.

ORDER OF DISMISSAL

MAZZONE, D.J.

In accordance with the Court's memorandum and order dated February 15, 1984 allowing the defendant's motion to dismiss, it is hereby ORDERED that the above entitled action and third party action be and hereby is dismissed.

EXHIBIT I

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

UNITED SERVICES AUTOMOBILE ASSOCIATION P.O. Box 33490 San Antonio, Texas 78265, Plaintiff, vs. KENNETH E. BARGER, JR. 154 Trotter Road Bessemer, Pennsylvania 16112, Defendant.	CASE NO. C88-4001 JUDGE COMPLAINT JUDGE ALDRASH JURY DEMAND ENDORSED HEREON FILED Oct. 31, 1988

PARTIES AND NATURE OF THE ACTION

1. United Services Automobile Association ("USAA") is a corporation organized pursuant to the laws of the State of Texas with its principal place of business located in San Antonio, Texas.

2. USAA is engaged in the business of insurance and at all times material hereto was licensed to do business in the States of Ohio and Pennsylvania. USAA insured John Gary Burke under policy number 087 90 70-70U against injury or damage for which Mr. Burke became legally liable. The coverage applied to occurrences during the policy period of June 29, 1983 throughout June 29, 1984.

3. USAA is subrogated to the rights of John Gary Burke.

4. Kenneth E. Barger, Jr. ("Barger") is an individual residing at 154 Trotter Road, Bessemer, Pennsylvania.

5. This is an action brought pursuant to the Law of the State of Ohio seeking compensatory damages for loss suffered by USAA, as the subrogated insurer of John Gary Burke, proximately resulting from the negligence of Barger. USAA's Complaint is based on the principles of negligence, master-servant vicarious liability, and indemnity.

6. Jurisdiction of this Court is founded on Title 28, U.S.C. §§ 1332 and 2201, Plaintiff and Defendants not being citizens of the same state and the amount involved in this controversy, exclusive of interest and costs, exceeding the sum of $10,000.

COUNT I

7. Plaintiff repeats, as if fully set forth herein, the averments previously set forth in this Complaint.

8. On or about September 21, 1983, while employed at a building site in Hubbard, Trumbull County, Ohio, Barger negligently caused injury to William Miller, an individual.

9. On or about September 21, 1983, Barger was a joint employee of Truck World, Inc., an Ohio corporation and John Gary Burke, the President and owner of all of the issued and outstanding shares of Truck World, Inc.

10. As a result of the aforesaid negligence of Barger, William Miller instituted a lawsuit against John Gary Burke in the Court of Common Pleas of Trumbull County, Ohio.

11. John Gary Burke, through his insurance carrier, USAA, entered an appearance in the aforesaid lawsuit filed by William Miller.

EXHIBIT J

No. 88-1234

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

UNITED SERVICES AUTOMOBILE ASSOCIATION,
AN UNINCORPORATED ASSOCIATION,

Petitioner,

versus

LEROY TUCK, ADMINISTRATOR OF THE
ESTATE OF JOHNNY L. TUCK, DECEASED,
LEROY TUCK, AN INDIVIDUAL AND
DOROTHY TUCK, AN INDIVIDUAL,

Respondents.

On Writ of Certiorari to the United States
Court of Appeals for the Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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COUNSEL OF RECORD FOR PETITIONER,
UNITED SERVICES AUTOMOBILE ASSOCIATION

PETITION FOR WRIT OF CERTIORARI

Petitioner and defendant/appellant below, United Services Automobile Association, an unincorporated association, respectfully petitions this Court for a writ of certiorari to the United States Court of Appeals for the Tenth Circuit to review its decision in the appeal styled *Tuck v. United Services Automobile Association*, Docket Number 85-2770.

QUESTIONS PRESENTED FOR REVIEW

1. Whether, having determined that the trial court lacked jurisdiction of the subject matter of this action, the Tenth Circuit had power to remand this case to allow the district court to attempt to create subject matter jurisdiction retroactively.

2. Whether the Tenth Circuit had power to remand to consider imposition of sanctions when the court had no jurisdiction of the subject matter of the litigation in the first instance.

STATEMENT OF PARTIES TO THIS PROCEEDING

The caption contains the names of all actual parties to this action. Since imposition of sanctions is an issue, however, petitioner's former counsel of record, Mr. Dan Rogers, would have a potential interest in this matter. Further, plaintiffs below may be granted leave to amend to change the party defendant. Thus, petitioner cannot at present provide the Court with the names of additional individuals who might become parties to this litigation upon amendment.

* * *

While petitioner recognizes the power of every court to determine its own jurisdiction (and the apparent power of the courts to maintain the status quo while doing so, *United States v. United Mine Workers of America*, 330 U.S. 258 (1947)), once a lack of jurisdiction is found, the authority of the court ceases. "[I]f the command was in whole or in part beyond the power of the court, . . . so much as was in excess of jurisdiction . . . was void. . . . Such is the settled rule of decision in this Court." *Ex parte Rowland*, 104 U.S. 604, 612 (1881). *See also Ex parte Fisk*, 113 U.S. 713 (1885). The effect of the court's instructions on remand is precisely that: a command beyond the power of the court. After conclusively deciding the jurisdictional issue adversely to the Tucks, the Tenth Circuit mandates additional proceedings which are clearly outside both its appellate authority and the district court's power.

It is axiomatic that subject matter jurisdiction, where it does not otherwise exist, cannot retroactively be created, by amendment or otherwise. *Anderson v. Watt*, 138 U.S. 694 (1891).

Here the appellate court's remand instructions brazenly go much further than directing the amendment of the plaintiffs' jurisdictional allegations. *See* 28 U.S.C. § 1653 (1982). They direct the district court and the Tucks to change the very substance of the action by completely changing the parties, if possible. The mandate exceeds the federal court's jurisdictional bounds and is an illegitimate exercise of power. It is just such usurpations of power which fall within the supervisory power of this Court. This Court should wield that supervisory power to review those actions by writ of certiorari.

* * *

EXHIBIT K

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEROY TUCK, Administrator of the Estate of JOHNNY L. TUCK, Deceased; LEROY TUCK, an individual and DOROTHY TUCK, an individual,	)	
Plaintiffs,	)	
vs.	)	No. 83-C-175-C
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Defendant.	)	

COMBINED OBJECTION TO MAGISTRATE'S RULING AND SUPPORTING MEMORANDUM BRIEF

(Filed Jan. 20, 1989)

Pursuant to Fed.R.Civ.P. 72(a), Defendant United Services Automobile Association objects to the Magistrate's Order of January 12, 1989, granting plaintiffs leave to conduct discovery in support of their quest for sanctions against USAA. For the reasons set forth in the following Memorandum Brief, included pursuant to Local Rule 14, USAA requests that the Magistrate's Order be reviewed and set aside by the assigned district judge.

SUPPORTING MEMORANDUM BRIEF

I. Summary of Proceedings Giving Rise to the Magistrate's Ruling

On October 14, 1989, the Tenth Circuit entered its Opinion expressly finding that, "as [this] case now

stands, there is not complete diversity among the parties and subject matter jurisdiction is lacking." *Tuck v. United Services Automobile Association*, 859 F.2d 842, 845 (10th Cir. 1988). Although federal jurisprudence clearly requires dismissal upon such a determination, the Tenth Circuit instead remanded the matter with instructions for further proceedings. The Tenth Circuit's instructions were specific: First, the court is to determine whether jurisdiction can be retroactively created without prejudice to USAA. Only in the event that is not possible, forcing dismissal of the action, *then* the court is to consider the need for sancions [sic]. The mandate issued on November 18, 1988.

At the time of the court-order status conference on January 12, 1989, (nearly two months after the issuance of the mandate), the plaintiff had made no attempt whatsoever to amend his pleadings to invoke this court's jurisdiction. As the case currently stands, the court is *still* without any jurisdiction to proceed. Accordingly, defendant filed a motion to dismiss for lack of jurisdiction. At the status conference, the plaintiff sought leave of court to conduct discovery in preparation for a hearing on sanctions. Over the objection of defendant, the magistrate permitted the plaintiff to serve one set of interrogatories to begin to prepare his case for sanctions.

II. Arguments and Authorities Supporting Review and Vacation of the Magistrate's Order

A.

THE MAGISTRATE'S ORDER ALLOWING DISCOVERY FAILS TO FOLLOW THE TENTH CIRCUIT'S MANDATE.

Without addressing the Tenth Circuit's illegitimate exercise of power (which has been addressed to the

United States Supreme Court in USAA's currently-pending Petition for Writ of Certiorari), USAA submits that the Magistrate's discovery Order goes beyond the Tenth Circuit's instructions on remand. It is, simply put, a case of putting the cart before the horse. The

* * *

EXHIBIT L

No. 83-C-175C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEROY TUCK, et al.,

Plaintiffs,

v.

UNITED SERVICES AUTOMOBILE ASSOCIATION, et al.

Defendants.

PLAINTIFFS' BRIEF IN SUPPORT OF
PLAINTIFFS' MOTION TO ENJOIN

Patrick E. Carr #1506

CARR & CARR ATTORNEYS
4520 W. Harvard, Suite 135
Tulsa, Oklahoma 74135
(918) 747-7207

COUNSEL FOR PLAINTIFFS

February 2, 1990

PROPOSITION II

THE DEFENDANT, USAA, HAS ENGAGED IN A SYSTEMATIC MANIPULATION OF THE FEDERAL COURT SYSTEM, CULMINATING IN ITS OUTRAGEOUS MISCONDUCT IN THE CASE. USAA SHOULD BE ENJOINED FROM FURTHER PARTICIPATION IN DIVERSITY LITIGATION IN FEDERAL COURT.

A. USAA continues to participate in cases on appeal in spite of its Motion to dismiss on appeal in Tuck.

The United States Court of Appeals for the Tenth Circuit made it perfectly clear that USAA was, one, to file motions to dismiss in all pending diversity litigation and, two, not to appear before it again "under similar circumstances." Not only has USAA flagrantly defied the Tenth Circuit by remaining in, and even initiating, diversity cases after that decision, it has, incredibly, appeared at least three times thereafter before a Court of Appeals in sister circuits under exactly the same circumstances, only in these cases USAA has not sought to dismiss the case for lack of subject matter jurisdiction because USAA would stand to lose if it did so. See Addendum: Exhibit "A" – Part I.

The decision of the Tenth Circuit was handed down on October 14, 1988. On October 31, 1988, only two weeks later, USAA filed a Complaint in the Northern District of Ohio claiming to be a Texas corporation. *USAA v. Barger*, Addendum: Exhibit "A" – Case #3. On March 23, 1989, USAA filed its Motion for Summary Judgment in *Barger*, only two weeks after filing its Reply Brief in Support of

* * *

Second only to these removal cases are those in which USAA is the plaintiff. While not divesting a state court of its legitimate jurisdiction, such cases do involve a fraud on the federal court whose jurisdiction is erroneously invoked. Moreover, an action for declaratory judgment commonly seeks to avoid a duty to defend or indemnify in a state court suit, and may even involve a stay of the state court proceedings. USAA has been the plaintiff in at least 41 cases since the *Baer* decision. Of these, 17, almost half, were filed, or remained opened, after USAA filed its Motion to Dismiss in *Tuck*, ten after its own Claims Department Bulletin, and four were still active after the Tenth Circuit's instruction to USAA to withdraw from all diversity cases. See Addendum: Exhibit "C."

One, *USAA v. Arey*, Addendum: Exhibit "A" – Case #1, which was filed in the Western District of Virginia on July 31, 1989, more than nine months after the *Tuck* decision, seeks a declaratory judgment that no coverage exists under a liability policy in a wrongful death case. Paragraph one of the Complaint falsely alleges that USAA is "a citizen of Texas by virtue of its being incorporated under Texas law and by virtue of having its principal place of business in Texas." This case is still pending.

USAA filed a Motion to Intervene in another case, *Pacific Int'l Services Corp. v. Kaji*, Addendum: Exhibit "A" – Case #5, on March 24, 1989, which was granted on June 5, 1989. The following day USAA filed its own counterclaim. This case, too, remains pending. The

* * *

EXHIBIT M

DION & ROSENAU
BY: BRUCE S. PANCIO, ESQUIRE
IDENTIFICATION NO. 46467 ATTORNEY FOR Plaintiff
SUITE 2010
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PHILADELPHIA, PA 19102
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UNITED SERVICES AUTOMOBILE ASSOCIATION vs. ANTHONY EVANGELISTA, Administrator of the Estate of VINCENT EVANGELISTA	IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA (Filed Dec. 4, 1987) *No.* 87-7793

COMPLAINT FOR DECLARATORY JUDGMENT

1. This action is filed under the Federal Declaratory Judgment Act, 28 U.S.C. Section 2201.

2. The plaintiff, United Services Automobile Association (USAA), is incorporated under the laws of the State of Texas, with its principal place of business in San Antonio, Texas. At all times relevant hereto, USAA was licensed to engage in the business of selling and servicing motorcycle insurance policies in the Commonwealth of Pennsylvania.

3. The defendant, Anthony Evangelista, is the administrator of the Estate of Vincent Evangelista, and is an

individual residing at 484 S. Poplar Street, Hazelton, Pennsylvania 18201.

4. The matter in controversy exceeds the sum of $10,000.00, exclusive of interest, costs and attorney's fees. The Court has jurisdiction by virtue of 28 U.S.C., Section 1332.

5. An actual controversy of justicible [sic] nature exists between the plaintiff and defendant, who are citizens of different States, involving rights and liabilities under a contract of insurance, and is dependent upon the construction of said contract of insurance, which controversy may be determined by a judgment in this matter, without other suits.

6. On or about September 2, 1984, Vincent Evangelista was involved in a motor vehicle accident on Interstate 81 in Hanover Township, Luzerne County, Pennsylvania, in which he sustained fatal personal injuries.

7. It was alleged that this accident occurred when an unknown vehicle made a sudden lane change and forced Chris Evangelista to lose control of his vehicle in which Vincent was a passenger.

8. At the time of the accident, Chris Evangelista's vehicle was insured with State Farm Mutual Automobile Insurance Company, and State Farm paid the Estate of Vincent Evangelista $25,000.00 in uninsured motorist benefits.

9. This $25,000.00 payment from State Farm represented its policy limits.

10. At the time of the accident, Vincent Evangelista owned a vehicle that was insured with Erie Insurance Company.

11. As a result of the accident, Erie paid the Estate of Vincent Evangelista $50,000.00 in uninsured motorist benefits.

12. This $50,000.00 payment from Erie represented its policy limits.

13. At the time of the accident, Vincent Evangelista was residing with his father Anthony Evangelista.

14. Anthony Evangelista was the owner of a vehicle that was insured with Erie

* * *

insurance issued to Mark Evangelista.

28. The defendant has been fully compensated as he has failed to exhaust the previous insurance policies.

WHEREFORE, plaintiff, United Services Automobile Association, requests that this Court enter declaratory judgment construing the policy of insurance attached as Exhibit A, and determining the respective rights and liabilities of the plaintiff and defendant thereunder and under the circumstances of the aforementioned incident and that defendant be permanently enjoined from seeking uninsured motorist benefits under said policy.

DION & ROSENAU

BY: Bruce S. Pancio
BRUCE S. PANCIO, ESQUIRE

VERIFICATION

I verify that the statements made in the foregoing COMPLAINT FOR DECLARATORY JUDGMENT are true and correct. I understand that false statements here made are subject to the penalties of 18 Pa. C.S. Section 4904 relating to unsworn falsifications to authorities.

/s/ Bruce S. Pancio
BRUCE S. PANCIO, ESQUIRE

Dated: November 23, 1987

EXHIBIT N-1

CONKLIN, SCHNEIDER & LOVE
A LAW CORPORATION

JOSEPH SCHNEIDER 614-0
MYLES T. YAMAMOTO 1667-0
400 Melim Building
333 Queen Street
Honolulu, Hawaii 96813
Telephone No. 531-1384

Attorneys for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas corporation, Plaintiff, vs. HAWAIIAN INSURANCE AND GUARANTY COMPANY, LTD., a Hawaii corporation, THE TRAVELERS INSURANCE COMPANIES, a Connecticut corporation, ROBERT THOMAS GARRITY, ROBERT EMMETT GARRITY, MRS. ROBERT EMMETT GARRITY, LAWRENCE VINCENT DOWNES, CORNELIUS D. DOWNES, MRS. CORNELIUS D. DOWNES, JOHN WILLIAM BERTRAND, DREW BERTRAND, MRS. DREW BERTRAND, ELTON BUNG KUM MOW, GEORGE K. B. MOW, and MRS. GEORGE K. B. MOW, Defendants.	CIVIL NO. 84-0300 COMPLAINT; EXHIBITS A and B; SUMMONS (Filed Apr. 3, 1984)

COMPLAINT

1. Plaintiff files this Complaint under the Federal Declaratory Judgment Act, 28 U.S.C. § 2201.

2. Plaintiff is a corporate citizen of Texas, incorporated in and having its principal place of business in the State of Texas.

3. Defendant Hawaiian Insurance and Guaranty Co., Ltd. ("HIG") is a corporate citizen of Hawaii, incorporated in and having its principal place or places of business in states other than the State of Texas.

4. Defendant The Travelers Insurance Companies ("Travelers") is a corporate citizen of Connecticut, incorporated in and having its principal place or places of business in states other than the State of Texas.

5. Defendants Robert Thomas Garrity, Mr. and Mrs. Robert Emmett Garrity, Lawrence Vincent Downes, Mr. and Mrs. Cornelius D. Downes, John William Bertrand, Mr. & Mrs. Drew Bertrand, Elton Bung Kum Mow, Mr. & Mrs. George K. B. Mow are citizens of Hawaii.

6. An actual controversy of a justiciable nature exists between Plaintiff and Defendants involving their respective rights and liabilities under various liability insurance policies which is dependent on the construction of said policies and which may be determined by a judgment of this court without other suits.

7. The matter in controversy exceeds $10,000, exclusive of interest and costs.

8. This court has jurisdiction because of diversity of citizenship of the parties.

* * *

EXHIBIT N-2

SCHNEIDER, LOVE & YAMAMOTO
A LAW CORPORATION

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Attorneys for

UNITED SERVICES AUTOMOBILE ASSOCIATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

TRANSAMERICA INSURANCE GROUP, Plaintiff, v. HAWAIIAN INSURANCE AND GUARANTY COMPANY, LTD.; et al., Defendants.	CIVIL NO. 87-0483-ACK UNITED SERVICES AUTOMOBILE ASSOCIATION'S SCHEDULING CONFERENCE STATEMENT (Filed Oct. 6, 1987)
UNITED SERVICES AUTOMOBILE ASSOCIATION, etc., Plaintiff, v. HAWAIIAN INSURANCE AND GUARANTY COMPANY, LTD., etc., et al., Defendnats. [sic]	CIVIL NO. 84-0300

UNITED SERVICES AUTOMOBILE ASSOCIATION'S SCHEDULING CONFERENCE STATEMENT

UNITED SERVICES AUTOMOBILE ASSOCIATION (USAA), Defendant in Civil No. 87-0483-ACK, hereby submits the following as its Scheduling Conference Statement as required by Local Rule 235-3(b) and the Order filed by this Court on June 19, 1987:

1. Service of Process

USAA has been served.

2. JURISDICTION AND VENUE

There is no dispute as to jurisdiction or venue.

3. ANTICIPATED MOTIONS

USAA will file a Motion for Summary Judgment in Civil No. 84-0300. This Motion for Summary Judgment will consolidate the rulings of the Court in Civil No. 84-0300 on three separate motions for partial summary judgment, which fix the rights and obligations of the parties in Civil No. 84-0300 under the terms of certain insurance policies.

Other motions may be filed as discovery progresses.

4. JOINDER OF PARTIES; AMENDMENTS

Amendments, if any, will be filed as discovery progresses.

5. ANTICIPATED OR REMAINING DISCOVERY

No discovery has yet been conducted by USAA in this action. Substantial discovery has been taken in Civil

No. 84-0300. USAA will conduct such discovery as may be necessary

* * *

EXHIBIT N-3

SCHNEIDER, LOVE & YAMAMOTO
A LAW CORPORATION

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Tel. No. 531-1384

Attorneys for UNITED SERVICES AUTOMOBILE ASSOCIATION

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

UNITED SERVICES AUTOMOBILE ASSOCIATION, etc.,	) CIVIL NO. 84-0300
Plaintiff,	) PRE-TRIAL STATEMENT OF UNITED SERVICES
vs.	) AUTOMOBILE
HAWAIIAN INSURANCE AND GUARANTY COMPANY, LTD. etc., et al.,	) ASSOCIATION and CERTIFICATE OF SERVICE
Defendants.	) (Filed Mar. 2, 1988)
TRANSAMERICA INSURANCE GROUP,	) CIVIL NO. 87-0483-ACK
Plaintiff,	

vs.

HAWAIIAN INSURANCE AND GUARANTY COMPANY, LTD.; et al.,

Defendants.

PRETRIAL STATEMENT OF UNITED SERVICES AUTOMOBILE ASSOCIATION

UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") pursuant to rule 235-7, Rules of the United States District Court for the District of Hawaii, hereby submits the following Pretrial Statement.

A. PARTY

This Pretrial Statement is submitted on behalf of United Services Automobile Association ("USAA"), Defendant in Civil No. 87-0483-ACK and Plaintiff in Civil No. 84-0300. USAA is a corporate citizen of Texas, incorporated in and having its principal place of business in the State of Texas.

B. JURISDICTION AND VENUE

This Court has jurisdiction based on the Federal Declaratory Judgment Act, 28 U.S.C. § 2202, and based on the diversity of citizenship of the parties. The matter in controversy, exclusive of interest and cost, exceeds the sum of $10,000. Jurisdiction and venue appear to be undisputed.

C. SUBSTANCE OF ACTION

Civil No. 84-0300, involves an insurance coverage dispute among three liability insurers: (1) Plaintiff USAA;

(2) Defendant, Hawaiian Insurance and Guaranty Co., Ltd. ("HIG"); and (3) Defendant, The Travelers Insurance Companies ("Travelers").

* * *

EXHIBIT O-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas corporation PLAINTIFF v. BARBARA WEAPPA, JULIE KRESS, REBECCA DAVIDSON and JEFFREY DAVIDSON DEFENDANTS	CIVIL ACTION NO. CVS6AR5072NW

COMPLAINT

(Filed Feb. 10, 1988)

1. The plaintiff, United Services Automobile Association (hereinafter referred to as USAA) is an insurance association incorporated under the laws of the State of Texas and having its principal place of business in San Antonio, Texas. The defendant Barbara Weappa is a resident citizen of the State of Alabama residing in Florence, Alabama. The defendant Julie Kress is a resident citizen

of the State of Tennessee residing in Loretto, Tennessee. The defendants Rebecca Davidson and Jeffrey Davidson are resident citizens of the State of Alabama residing in Florence, Alabama. Jurisdiction of this action in the United States District Court for the Northern District of Alabama is founded upon diversity of citizenship under the provisions of 28 USC 1332, 1441. The amount in controversy as to each claim between the parties exceeds the sum of $10,000.00 and costs.

2. On September 13, 1985, USAA had in force and effect a policy of automobile liability insurance which covered the defendant Barbara Weappa against claims made against her and

* * *

EXHIBIT O-2

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ALABAMA
NORTHWESTERN DIVISION

UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Plaintiff	)	CIVIL ACTION NUMBER 86-AR-5072-NW
v.	)	
BARBARA WEAPPA, et al	)	
Defendants	)	

PRE-TRIAL ORDER

(Filed Aug. 5, 1986)

A pre-trial conference was held in the above case on August 5, 1986, wherein, or as a result of which, the following proceedings were held and action taken:

1. Appearances. Appearing at the conference were:

Plaintiff: Robert E. Jones, III

Defendant Weappa: Wilson Mitchell

Defendant Kress: [Illegible]

Defendants Davidson: Frank Potts

2. Jurisdiction and venue. Subject matter jurisdiction exists under 28 USC 1332 by reason of the amounts in controversy and the admitted diversity of citizenship. Personal jurisdiction and venue are not contested.

3. Parties and trial counsel. Any fictitious defendants are deleted; the parties before the court are

* * *

EXHIBIT P-1

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA,
ALBANY-AMERICUS DIVISION

HENRY A. PRIDGEN, As Next Friend for HENRY A. PRIDGEN, III, A Minor,	:	NO: 84-247-ALB-AMER
Plaintiff,	:	
vs.	:	
UNITED SERVICES AUTOMOBILE ASSOCIATION,	:	
Defendant.	:	

PETITION OF DEFENDANT FOR REMOVAL

Comes now petitioner, UNITED SERVICES AUTOMOBILE ASSOCIATION, and files this their petition for removal pursuant to 28 U.S.C.A. § 1441, et seq., and respectfully shows this Court:

1.

On October 24, 1984, a civil action was filed against petitioners in the Crisp County Superior Court, to-wit: HENRY A. PRIDGEN, As Next Friend for HENRY A. PRIDGEN, III, A Minor, Plaintiff vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant, Civil Action No. 84-V-431. Copies of the complaint, Request For Admissions, First Interrogatories and Requests For Production Of Documents of Defendant and Summons are attached hereto.

2.

The foregoing civil action was served on Petitioners on

* * *

STATE OF GEORGIA,
COUNTY OF DOUGHERTY.

VERIFICATION

Personally appeared before the undersigned, an officer duly authorized to administer oaths in said State and County, Hilliard P. Burt, who, as counsel for petitioner, on oath, states that the foregoing statements are true and correct to the best of his knowledge and belief.

Sworn to and subscribed
before me this the 12th
day of November, 1984.

/s/ Hilliard P. Burt
HILLIARD P. BURT,
Attorney

/s/ Mary Kathryn Williams
NOTARY PUBLIC

My Commission Expires: 11-12-85

EXHIBIT P-2

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF GEORGIA,
ALBANY-AMERICUS DIVISION

HENRY A. PRIDGEN, As Next Friend for HENRY A. PRIDGEN, III, A Minor,	:	NO. 84-247-ALB-AMER
Plaintiff	:	
VS.		
UNITED SERVICES AUTOMOBILE ASSOCIATION,	:	
Defendant	:	

MOTION TO REMAND

Plaintiff, Henry A. Pridgen, as next friend for Henry A. Pridgen, III, a minor, by his undersigned Attorney, hereby moves this Court for an order remanding the above entitled action to the Superior Court of Crisp County, State of Georgia, from whence it was removed to this Court, on the ground that at the time of the filing of defendant's petition for removal of the action to this Court, both plaintiff and defendant were citizens of the State of Georgia. This Court is therefore without original and removal jurisdiction over the above entitled action.

Plaintiff further moves the Court for an Order directing defendant to pay all of plaintiff's costs and disbursements incurred by reason of defendant's wrongful removal of the above entitled action to this Court.

DATED this, 19th day of November, 1984.

DAVIS, PRIDGEN and JONES

By: /s/ John C. Pridgen
John C. Pridgen
Attorneys for Plaintiff

P.O. Box 397

Vienna, Georgia 31092

* * *

Defendant subsequently filed its petition in this Court for removal alleging diversity jurisdiction under 28 U.S.C. § 13 [sic]

PART II

ARGUMENT AND CITATION OF AUTHORITY

In order to determine diversity jurisdiction it must first be determined whether defendant is a corporation or an unincorporated association.

As stated in an affidavit filed by defendant in *Baer vs. United Services Automobile Association*, 503 F.2d 393, 394 (2d Cir. 1974),

> "United Services Automobile Association is not the average insurance company. It is indeed not a corporation, but 'an inter-insurance exchange'. . . . It insures only servicemen, ex-servicemen, and their immediate families. It sometimes refers to its insureds as 'members'. . . . It attempts, to an extent, to treat its insureds as partners in an Enterprise, rather than to deal with them on a strictly adversary basis."

In the insurance policy which is the subject matter of the instant law suit, defendant, United Services Automobile Association (hereinafter referred to "USAA") maintains this self-appraisal by referring to itself only as "a reciprocal inter-insurance exchange". (A copy of the subject insurance policy is attached as Exhibit "A").

If USAA is an unincorporated association formed under Texas law and engaged in the issuance of insurance, it cannot be considered a corporation for purposes of establishing diversity of citizenship. *Baer vs. USAA*, supra. Further, for purposes of determining whether diversity jurisdiction exists, unincorporated associations will be considered to be citizens of each and every state in which the association has members. *Arbuthnot vs. State Automobile Insurance Association*, 264 F.2d 260 (10th Cir. 1959). It is inconceivable that USAA has no other members who are citizens of the State of Georgia other than plaintiff.

It should also be noted that the petition for removal filed by USAA does not allege that USAA is a corporation. It neither alleges USAA's state of incorporation or its principal place of business but rather states "petitioners are residents and citizens of the State of Texas".

Assuming arguendo that USAA is a corporation diversity jurisdiction would still be lacking because of the proviso in 28 U.S.C. § 1332(c), which states

> "That in any direct action against the insurer of a policy or contract of liability insurance, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the state of which the insured is a citizen, as well as any state by which the insurer has

been incorporated and the state where it has its principal place of business."

This proviso to 28 U.S.C.§ 1332(c) was added by the Congress in 1964 and the immediate purpose of the 1964 amendment was made clear in the legislative history. Wisconsin and Louisiana had enacted direct action laws permitting a person injured by another who was covered by liability insurance to sue the liability carrier rather than the alleged tort feasor. Thus even where the plaintiff and the alleged tort feasor were residents of the same state, if the liability carrier was a citizen of a different state, diversity jurisdiction could be asserted by the liability carrier. This resulted in a flood of essentially local law suits in the already crowded district court dockets.

Following the 1964 amendment to § 1332(c) many states including Georgia, passed no-fault insurance. (Ga. L. 1974, p. 113). No-fault insurance in many respects replaced traditional tort liability by enabling an injured party to

* * *

EXHIBIT P-3

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA,
ALBANY-AMERICUS DIVISION

HENRY A. PRIDGEN, As Next Friend for HENRY A. PRIDGEN, III, A Minor, Plaintiff	CIVIL ACTION NO. 84-247-ALB-AMER
vs.	DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND
UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant	

I.

FACTUAL BACKGROUND

U.S.A.A., Defendant in the above action, is a reciprocal interinsurance exchange, domiciled in the State of Texas, and licensed under Chapter 19 of the Texas Insurance Code. U.S.A.A. is licensed to do business as a property/casualty insurer in all fifty states, as well as certain foreign locations, and has over 1.2 million policyholders. (Affidavit of John L. Swyers.)

U.S.A.A. is managed by a Board of Directors, elected by the policyholders at an annual meeting. Operational management is by a President, who is also the Attorney-in-Fact, and several Vice Presidents. The Association's headquarters are located in San Antonio, Texas in its own building which houses approximately 5,800 employees. Approximately 800 employees are located in field service offices in several other states.

U.S.A.A. is the parent company in an insurance holding company system regulated under Article 21.49-1 of the Texas Insurance Code. US.A.A. owns all the stock of several subsidiary Texas insurance and financial service corporations.

Upon being served by Plaintiff in Crisp County Superior Court for alleged failure to timely pay $47,500.00 in Personal Injury Protection benefits, U.S.A.A. removed this action to this Court pursuant to 28 U.S.C. § 1332. Plaintiff has filed his Motion to Remand.

II.

ARGUMENT AND CITATION OF AUTHORITY

(A)

For purpose of 28 U.S.C. § 1332, U.S.A.A. should be considered a citizen of Texas.

The U.S. Supreme Court in *Puerto Rico v. Russell & Co.*, 28 U.S. 476, 77 L.Ed. 903 (1933) the Court held in determining whether diversity of citizenship exists so as to give a Federal Court jurisdiction of a suit against a sociedad en commondita organized under Puerto Rican Commercial Code, the citizenship of its members is immaterial.

The Court said:

> granting the preliminary injunction, abides the hearing.
>
> Perhaps the most recent case in which the question has been determined is in *Van Sant v. American Express Co.*, 3 Cir., 169 F.3d 355, 372, where a New York joint stock association was

> treated as a corporation for purposes of diversity and, hence, as a citizen of New York. In its opinion, the court observed (in a foot-note) that the old rule 'that generally speaking an unincorpoarted [sic] association has no citizenship for diversity purposes is itself beginning to show signs of being outmoded.' "
>
> However, the rule that the citizenship of unincorporated associations generally is that of its members, seems to be losing its vitality. 'There is some evidence . . . that the present federal rule is undergoing change, for the Supreme Court has treated a sociedad en comandita organized under Puerto Rico law as a citizen and resident of Puerto Rico for purposes of federal jurisdiction.' *Moore's Federal Practice*, Volume 3, page 1413 (2d Edition). In the case above referred to, *People of Puerto Rico v. Russell & Co.*, 288 U.S. 476, 53 S.Ct. 447, 448, 77 L. Ed. 903, the court held that a sociedad en comandita under the laws of Puerto Rico was not a limited partnership in the common-law sense, but a juridical person, with a personality like that of a corporation, and that it had the status of a corporation for purposes of federal jurisdiction, that is, citizenship."

The citizenship of a business trust is determined by the citizenship of the trustees, rather than that of the individual beneficiaries. *Navarro Savings Assoc. v. Lee*, ___ U.S. 458 (1980).

U.S.A.A. is a "reciprocal inter-insurance exchange" organized under the laws of the State of Texas. Under Texas Law, such exchanges are similar, if not identical to, corporations. In Wilson v. Marshall, 218 S.W. 2d 345, 346,

(1949) the Court of Civil Appeals of Texas described them as follows:

> "The subscribers at a reciprocal exchange are not only policyholders therat and as such entitled to the protection afforded by the policies and required to pay the premiums stipulated in the policies; but they also own the insurance business just as stockholders own their corporation. They are the owners of their insurance exchange, and as such are entitled to reap the profits accruing from the operation of their insurance business and are also required to pay their pro rata part of the losses and expenses incurred at the exchange. It is their liability to pay their pro rata part of the losses and expenses that take the place of the capital structure of the exchange. When called upon to pay an assessment for his pro rata part of the losses, the subscriber at the exchange stands in the position of a stockholder in a stock insurance company whose capital structure has become depleted and who is required to pay a certain amount on each share of stock he owns into the coffers of the company to remove the deficit."

Additionally, indicia of the defendant's corporate status may be found in the fact that U.S.A.A. is the parent company in an insurance holding company system regulated under Article 21.49-1 of the Texas Insurance Code. U.S.A.A. owns all the stock of several subsidiary Texas insurance and financial service corporations. Also, like a corporation, U.S.A.A. is controlled by a Board of Directors, has officers, and is governed by a set of By-laws.

An examination of the Texas statutes pertaining to reciprocal inter-insurance exchanges indicates that such

exchanges may be corporations. In fact, such an examination reveals that the term "reciprocal exchange" is less a description of the type of business organization than it is a description of the type of insurance arrangement. See Article 19.01 of the Texas Code of Insurance, a copy of which is attached to Mr. Swyers' affidavit.

Moreover, reciprocal insurance exchanges are subject virtually to the same regulatory scheme as corporations. See Article 19 of the Texas Insurance Code.

Additionally, United Services Automobile Association, has registered as a member of a holding company system under the Article 21.49-1 of the Texas Insurance Code, a statute generally regarded as governing corporate activity. See *Lebowitz L.J. Corporations,* 26 Southwest Law Journal 87, 90, wherein said statute is discussed under the annual survey of corporate law. U.S.A.A.'s position in the holding system is as the parent or holding company, not simply as a small subsidiary, in the United Services Automobile Association group. Because U.S.A.A. is the parent company of a number of subsidiary corporations, and because, regardless of which subsidiary one is in fact dealing with, all communications are directed to the same corporate headquarters in San Antonio, Texas, one can conclude that the parent and the subsidiaries are really one and the same and should be treated as one corporation.

Clearly, U.S.A.A. is a corporate entity in everything but name. For this reason, Defendant urges this Court to treat it as such for purposes of determining its citizenship, as the Supreme Court did in *Puerto Rico vs. Russell & Company,* 288 U.S. 476 (1933). In that case the Court held

that because a "sociedad decomandita" so closely resembled a corporation it should be treated as one for purposes of determining its citizenship. In so finding, the Court held that because the "sociedad" is treated as a "judicial person" under the laws of Puerto Rico, "we saw no adequate reason in holding that the sociedad has a different status for purposes of federal jurisdiction than a corporation organized under that law." So too, because U.S.A.A. appears to act and be treated as a "person distinct from its members", under the law of Texas, it should not be treated here any differently than a Texas corporation.

Plaintiff has relied in its Brief upon *Baer vs. United Services Automobile Association*, 503 F. 2d 393 (2d Cir. 1974), in which the Courtof [sic] Appeals for the Second Circuit find sua sporte, the parties were unable to bring most of the facts relied upon herein to the Court's attention. The decision appears to rest exclusively upon the Court's reading of Articles 2 and 19 of the Texas Insurance Code, and the fact that U.S.A.A. restricts the availability of its insurance to servicemen. The court apparently relied upon no Texas case law to reach its conclusion that a reciprocal exchange is not similar to a corporation. As mentioned above, *Wilson*, supra, holds that the two are almost identical. Nor did the Court consider U.S.A.A's status as a holding company, under Article 21.49-1 of the Texas Insurance Code. Lastly, *Baer* was decided in 1974, and, while it may have been a smaller operation then, which more closely resembled a voluntary association, today it is clearly a huge corporate organization.

In *United Services Automobile Association vs. Glens Falls Insurance Company*, 429 F. Supp. 101, 105 (D. Conn. 1976) the Court described United Services Automobile Association as a "Texas corporation", and found diversity jurisdiction on that basis. That was a case in the Second Circuit decided two years after the *Baer* decision.

It is interesting to note that:

> "Business entities that are not incorporated pursuant to state law may qualify for treatment as corporations for federal tax purposes. These organizations, called associations, must have more corporate characteristics than partnership or trust characteristics. The Treasury Regulations identify certain characteristics that establish 'corporateness' against which unincorporated business entities are measured. If the organization has more corporate characteristics than not, it will be identified as a corporation. These characteristics are: '(i) Associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interests.'" *3A Cavitch, Business Organizations*, § 64.02 (3).

Under 28 U.S.C. 1332, a corporation is a citizen of both the place of its incorporation and its principal place of business. United Services Automobile Association is, therefore, a citizen of Texas since it was organized under Texas law, and as a holding company, its principal place of business is considered to be the location of its "nerve center", i.e. "the location from which the corporation's officers direct, control, and coordinate all activities without regard to location, in the furtherance of the corporate

objective" *Lugo Vina vs. Pueblo Intern Insurance*, 574 F. 2d 41, 43, (1st Cir. 1979). Since all officers operate out of San Antonio, Texas, that is the "nerve center" and principal place of business of United Services Automobile Association.

For the foregoing reasons, the Defendant respectfully urges this Court to deny the Plaintiff's Motion to Remand.

(B)

Plaintiff contends this is a "direct" action against an insurance company and therefore is not removable pursuant to a proviso added to 28 U.S.C. § 1332: "Any direct action against the insurer of a policy or contract of liability insurance . . . such insuror [sic] shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insuror [sic] has been incorporated and of the State where it has its principal place of business."

It is basic hornbook law that removal jurisdiction is keyed to original diversity jurisdiction under 28 U.S.C. § 1332. "As under the predecessor statute, removal under section 1441 is keyed generally to original jurisdiction of the district of courts." 7B J. Moore, *Moore's Federal Practice*, at page J.C.-699.

Georgia's no-fault law is not a direct action statute. A

* * *

EXHIBIT Q

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LUZ STOUT AND LLOYD STOUT INDIVIDUALLY, AND AS THE NATURE ADMINISTRATORS OF THE ESTATE OF THEIR MINOR CHILD, ANGIE STOUT	CIVIL ACTION
VERSUS	NO: 88-800
LINDA CLAING HAMBY AND UNITED SERVICES AUTOMOBILE ASSOCIATION	SEC. A

PETITIONER FOR REMOVAL
(Filed Sept. 22, 1988)

NOW INTO COURT, through undersigned counsel, comes United Services Automobile Association, defendant in the above entitled and numbered proceeding, who would represent that:

1.

Plaintiffs were on August 16, 1988, at the time of the filing of the Original Petition herein, and at the time of the filing of this Petition for Removal, citizens of the State of Louisiana.

2.

Defendant, Linda Claing Hamby, was on August 16, 1988, at the time of the filing of the Original Petition

herein, and as of the time of the filing of this Petition for Removal, a citizen of the State of Georgia; and United Services Automobile Association, was on August 16, 1988, at the time of the filing of the Original Petition herein, and as of the time of the filing of this Petition for Removal, a foreign insurer whose principal place of business and whose citizenship for purposes of diversity is a state other than the State of Louisiana.

3.

The amount in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand and No/100 ($10,000.00) Dollars.

4.

The Original Petition in this matter was filed in the 19th Judicial District Court for the Parish of East Baton Rouge and is now pending as Docket Number 333,963 "L" on the docket of that Court. That proceeding is a civil action for damages sustained by Luz Stout, Lloyd Stout, and Angie Stout as a result of an automobile accident involving a vehicle owned by Lloyd Stout and driven by Luz Stout, in which vehicle Angie Stout was a guest passenger, and a vehicle owned by James Hamby and driven by Linda Claing Hamby, which vehicle was allegedly insured by United Services Automobile Association.

5.

Service of process was effected upon United Services Automobile Association on August 25, 1988. Service of process has not been effected upon Linda Claing Hamby.

6.

A copy of the Original Petition filed in the 19th Judicial District Court for the Parish of East Baton Rouge is attached hereto and made a part hereof.

7.

Federal subject matter jurisdiction is proper under 28 U.S.C.A. 1441, and venue is proper under 28 U.S.C.A. 1391(a) and was also proper had the Petition originally been brought in the United States District Court for the Middle District of Louisiana.

8.

This proceeding is therefore, removable to the United States District Court for the Middle District of Louisiana under 28 U.S.C.A., and the Petition for Removal has been timely filed within thirty (30) days of service of process on Defendant.

9.

Defendant, United Services Automobile Association, has filed concurrently herewith a bond, in accordance with Rule 3(E) of the General Rules of This Court, conditioned that they will pay costs and disbursements

incurred by reason of these removal proceedings in the event that it is deemed removal is not proper.

WHEREFORE, Defendant, United Services Automobile Association, prays that the above entitled and numbered proceeding be removed to the United States District Court for the Middle District of Louisiana in accordance with 28 U.S.C.A. 1441.

By Attorneys,

SEALE, SMITH & PHELPS

BY: /s/ John Swanner
JOHN SWANNER

CERTIFICATE

I hereby certify that a copy of the above and foregoing has been mailed this date to all counsel of record.

Baton Rouge, Louisiana, this 21st day of September, 1988.

/s/ John Swanner
JOHN SWANNER

EXHIBIT R-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROBERT D. LILES, JR. and
LOIS LILES — PLAINTIFFS

vs. — NO. EC86-336-S-D

UNITED SERVICES AUTOMOBILE
ASSOCIATION — DEFENDANT

PETITION FOR REMOVAL

(Filed Nov. 19, 1986)

Now comes United Services Automobile Association, a corporate defendant in the above cause, and files this, its Petition for Removal of this cause from the Circuit Court of Lee County, Mississippi, in which it is now pending, to the District Court of the United States in and for the Eastern Division of the Northern District of Mississippi, held in the City of Aberdeen, Mississippi, in said District and State, and shows to the Court the following facts:

1. That this cause of action was commenced in the Circuit Court of Lee County, Mississippi on October 17, 1986 and that process was served on Mississippi Insurance Commissioner on October 21, 1986, and was mailed to Defendant that day and was received a day or two later; that a copy of the Plaintiffs' Complaint setting forth the claim for relief upon which the action is based, was first received by the Petitioner on a day or two after October 21, 1986.

2. That the action is one of the civil nature, over which the District Courts of the United States have original jurisdiction, being a controversy between citizens of

different states; the said action being brought by the Plaintiffs is for recovery for the alleged bodily injuries and damages incurred as a result of an automobile collision which occurred on the streets of Tupelo, Mississippi on or about November 27, 1984.

3. That the amount in dispute exceeds the sum of ten thousand dollars, exclusive of interest and costs, the suit being for the sum of $100,000.00 actual damages, as will more fully appear by the Plaintiffs' Complaint, a copy of which is hereto attached and which is referred to and made a part hereof.

4. That, at the time of the commencement of this action, and since that time the Plaintiffs were and are now residents and citizens of the State of Mississippi and of the County of Lee in said State of Mississippi and that this Defendant is a corporate non-resident of the State of Texas, whose street and post office address is: United Services Automobile Association, U.S.A.A. Bldg., San Antonio, Texas 78288, and is not now and was not at the time of the institution of this action nor at any time a citizen or resident corporation of the State of Mississippi.

5. That the Defendant, United Services Automobile Association, files herein a bond, with good and sufficient sureties for paying all costs and disbursements incurred by reason of these removal proceedings, if this Court shall hold that the action is nor removable or improperly removed thereto, as provided by the statutes of the United States.

* * *

EXHIBIT R-2

VERIFICATION

STATE OF MISSISSIPPI

COUNTY OF UNION

Hugh N. Clayton, of lawful age, being duly sworn upon his oath says that he is one of the attorneys for the Petitioner herein; that he has prepared and read the above and foregoing Petition for Removal, and that the matters and things contained therein are true, as he verily believes.

/s/ Hugh N. Clayton

Subscribed and sworn to before me this, the 19th day of November, 1986.

/s/ Peggy Crumcter
Notary Public in and for
Union County, Mississippi

SEAL

My commission expires:

My Commission Expires March 4, 1989

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROBERT D. LILES, JR. AND
LOIS LILES — PLAINTIFFS

VS. — EC 86-336-S-D

UNITED SERVICES AUTOMOBILE
ASSOCIATION — DEFENDANT

RESPONSE TO REQUEST FOR ADMISSIONS

Now comes the defendant, United Services Automobile Association, and in answer to the plaintiff's request for admission, says:

1. That the plaintiffs, Robert D. Liles, Jr. and Lois Liles are adult resident citizens of Lee County, Mississippi.

ANSWER TO NO. 1: Admitted.

2. That the Defendant, United Services Automobile Association is an insurance company, licensed and doing business in the State of Mississippi.

ANSWER TO NO. 2: Denied. United Services Automobile Association is a reciprocal inter-insurance exchange as opposed to "an insurance company."

3. That prior to November 27, the Defendant issued to Robert D. Liles, Jr., as named insured, for valuable consideration, a liability insurance policy hearing the number 107 79 91U 7103 6.

ANSWER TO NO. 3: Admitted.

4. That the said policy was in full force and effect on November 27, 1984.

ANSWER TO NO. 4: Admitted.

* * *

EXHIBIT R-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

ROBERT D. LILES, JR.
ET UX — PLAINTIFF

VS. — CIVIL ACTION NO. EC86-336-S-D

UNITED SERVICES AUTOMOBILE ASSOCIATION — DEFENDANT

PRETRIAL ORDER

(Filed Jul 12 1988)

1. A pretrial conference was held in this matter on the 18th day of February 1988, at 1:30 P.M. at the United States Courthouse at Aberdeen, Mississippi before U. S. Magistrate Jerry A. Davis.

2. The following counsel appeared:

a. For the Plaintiff:

Name	Address	Telephone
John L. Long	315 Magazine Street Tupelo, MS 38801	601-842-2364

b. For the Defendant:

Name	Address	Telephone
John H. Dunbar	P.O. Drawer 707 Oxford, MS 38655	601-234-8775

c. For other Parties:

Party	Lawyer's Name	Address	Telephone

3. The pleadings are amended to conform with this pretrial order.

4. The following claims (including claims stated in the complaint), counter-claims, third-party claims, cross-claims, etc., have been filed:

U-coverage claims for all damages for bodily injury (including all reasonable and necessary medical expenses incurred whether paid or unpaid) caused by the negligence of an uninsured motorist.

5. The basis for jurisdiction is:

Diversity of citizenship jurisdictional amount in excess of $10,000. (28 U.S.C. § 1332 and 28 U.S.C. § 1441).

There is the following jurisdictional question:

Lack of diversity and/or severance of case.

6. There are pending motions as follows:

Oral motions made at hearing will be reduced to writing.

The Defendant reserves the right to use any of the Plaintiffs' witnesses in its case-in-chief.

Will testify by deposition:

Indicate whether the entire deposition, or only portions thereof, will be used. Not later than 20 days prior to trial counsel shall confer for the purpose of resolving all controversies concerning depositions. All such controversies not so resolved shall be submitted to the court not later than 10 days prior to trial. All objections not submitted within that time are waived.

Dr. Tom McDonald, in part.

14. This is a jury case.

15. Counsel suggest the following additional matters to aid in the disposition of the action:

JHD DLL

16. Counsel estimate the length of the trial will be 2 full days.

17. This pretrial order has been formulated at a pretrial conference before the United States Magistrate, notice of which was duly served upon all parties, and at which the parties attended as hereinabove shown. Reasonable opportunity has been afforded for corrections or additions prior to signing. This order will control the course of the trial, as provided by the Rule 16, Federal Rules of Civil Procedure, and it may not be amended except by consent of the

parties and the court, or by order of the court to prevent manifest injustice.

This the 11th day of July, 1988.

/s/ Illegible
UNITED STATES DISTRICT COURT

/s/ John L. Long
Attorney for Plaintiff

/s/ John H. Dunbar
Attorney for Defendant

Entry of the above Pretrial Order recommended, this the 8th day of July, 1988.

/s/ Jerry D Davis
UNITED STATES MAGISTRATE

EXHIBIT R-4

IN THE CIRCUIT COURT OF
LEE COUNTY, MISSISSIPPI

ROBERT D. LILES, JR. AND LOIS LILES — PLAINTIFFS

VS. — CAUSE NO. 20,499

UNITED SERVICES AUTOMOBILE ASSOCIATION — DEFENDANT

AMENDED COMPLAINT

Comes now the Plaintiffs, Robert D. Liles, Jr. and Lois Liles, and brings this cause of action against Defendant, United Services Automobile Association and for cause of

action would respectfully show unto the Court the following:

COUNT ONE

-1-

That the Plaintiffs, Robert D. Liles, Jr. and Lois Liles, are adult resident citizens of Lee County, Mississippi and that the Defendant, United Services Automobile Association, is an unincorporated association and as an entity, licensed and doing business in the State of Mississippi, who has designated for the purpose of accepting its legal process in the State of Mississippi, George Dale, Commissioner of Insurance, Jackson, Mississippi.

-2-

That prior to November 27, 1984, Defendant issued to Plaintiff, Robert D. Liles, Jr., as named insured, for valuable consideration, a liability insurance policy bearing the number 107 79 9IU 7103 6. That said policy was in full force and effect on November 27, 1984. That under the terms of said policy, Defendant, among other things, agreed to pay all sums which the Plaintiffs would be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injuries sustained by Plaintiff which was caused by an accident arising out of the ownership, maintenance, or

use of such uninsured motorist vehicle. That on November 27, 1984, Lois Liles, was insured under the terms of said policy of insurance.

-3-

That a true correct copy of the declaration sheet and insurance policy is attached to the original Complaint and marked Exhibit "A" and is hereby incorporated by reference thereto.

* * *

EXHIBIT R-5

IN THE CIRCUIT COURT OF LEE COUNTY MISSISSIPPI

ROBERT D. LILES, JR. AND LOIS LILES — PLAINTIFFS

VS. — CAUSE NO. 20,499

UNITED SERVICES AUTOMOBILE ASSOCIATION — DEFENDANT

DEFENDANT'S MOTION TO STRIKE PLAINTIFF'S AMENDED COMPLAINT

COMES NOW the defendant, United Services Automobile Association (USAA), and moves this Court to strike the plaintiff's amended complaint for failure to

seek leave of court to amend. In support of this motion, defendant would show the following:

(1) This case was originally filed in the Circuit Court of Lee County, Mississippi in 1986. Before any responsive pleading was filed in the state court, the case was removed to the Federal District Court, Northern District of Mississippi.

(2) After removal, the defendant filed an answer, discovery was completed, and the case went to a jury trial in July, 1988. The federal court entered judgment on the jury verdict.

(3) After judgment was entered, the plaintiffs filed several post-trial motions. While these motions were pending, the plaintiffs also filed a motion to remand in October, 1989, alleging lack of diversity jurisdiction on the ground that defendant was an unincorporated association with members in Mississippi. The defendant had to agree.

(4) The federal district court vacated its final judgment and remanded the case to the Circuit Court of Lee County, Mississippi.

(5) After the remand, the plaintiffs filed an amended complaint, without seeking leave of Court, representing to the defendant that they were amending as a matter of course because no responsive pleading had been filed in the state court. The plaintiffs' post-trial motions are still pending.

(6) State law controls the effect of pleadings filed in federal court in a removed case that is later remanded.

(7) There appears to be no precedent in Mississippi holding that pleadings filed in federal court are of no effect once the case has been remanded. In the absence of such precedent, the defendant moves the Court for an order requiring the plaintiffs to seek leave of court to amend their complaint, particularly when post-trial motions are pending.

(8) Unless the plaintiffs are required to seek leave of court before amending their complaint, the defendant will be given no opportunity to show the prejudice that will result from an amendment at this late stage of the proceedings, and will have no remedy for this prejudice.

WHEREFORE, premises considered, the defendant moves the court for an order striking plaintiffs' amended complaint for failure to seek leave of court to amend.

Respectfully submitted, this 15 day of December, 1989.

HOLCOMB, DUNBAR,
CONNELL, CHAFFIN
& WILLARD
P.O. Drawer 707
Oxford, MS 38655
(601) 234-8775

BY /s/ John H. Dunbar
JOHN H. DUNBAR

EXHIBIT R-6

IN THE CIRCUIT COURT OF
LEE COUNTY, MISSISSIPPI

ROBERT D. LILES, JR. AND LOIS LILES — PLAINTIFFS

VS. — CAUSE NO. 20,499

UNITED SERVICES AUTOMOBILE ASSOCIATION — DEFENDANT

MOTION FOR SUMMARY JUDGMENT

COMES NOW the defendant, United Services Automobile Association (USAA), and files a motion for summary judgment pursuant to Miss.R.Civ.P. 56. In support of its motion, USAA would show the following:

(1) This case was originally filed in the Circuit Court of Lee, County, Mississippi in 1986. The Plaintiff erroneously alleged and the Defendant erroneously admitted that USAA was a foreign corporation. Before any responsive pleading was filed in the state court. The case was removed to the Federal District Court for the Northern District of Mississippi.

(2) After removal, the defendant filed an answer, discovery was completed, and two years later, the case went to a jury trial in July, 1988. The jury found for Plaintiff Lois Liles and awarded $500 in damages; the jury returned a verdict against Plaintiff Robert Liles. The federal court entered judgment on the jury verdict.

(3) After judgment was entered, the Plaintiff filed several post-trial motions. While these motions were still

pending, the plaintiffs also filed a motion to remand in October, 1989, alleging lack of diversity jurisdiction on the ground that defendant was an incorporated association with members in Mississippi. The defendant had to agree.

(4) The federal district court had no choice but to remand the case to the Circuit Court of Lee, County, Mississippi.

(5) State law controls how the state court shall proceed when a case is remanded to state court.

(6) There is no precedent in Mississippi about how the state court should proceed under the circumstances of this case.

(7) In the absence of such precedent, the defendant moves for a ruling that the plaintiffs are not entitled to another jury trial. Other states have held that a case is remanded to the state court in the same procedural posture it occupied in federal court at the time of remand.

(8) The plaintiffs had a fair and complete opportunity to litigate their claim in federal court. This Court should recognize the outcome of that proceeding and avoid the substantial expense to all involved of another jury trial, unless one is justified by the plaintiff's post-trial motion. If no new trial is justified, the court should enter a summary judgment based on the outcome of the trial in federal court.

WHEREFORE, premises considered, the defendant moves this court for an order granting summary judgment based on the outcome of the federal court proceeding.

Respectfully submitted, this 15 day of December, 1989.

HOLCOMB, DUNBAR,
CONNELL, CHAFFIN
& WILLARD
P.O. Drawer 707
Oxford, MS 38655
(601) 234-8775

By /s/ John H. Dunbar
JOHN H. DUNBAR

IN THE CIRCUIT COURT OF
LEE COUNTY, MISSISSIPPI

ROBERT D. LILES, JR. AND LOIS LILES — PLAINTIFFS

VS.

CAUSE NO. 20,499

UNITED SERVICES AUTOMOBILE ASSOCIATION — DEFENDANT

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant United Services Automobile Association (USAA), submits this brief in support of its motion for summary judgment.

This case was originally filed in the Circuit Court of Lee County, Mississippi. It was later removed to federal court, where the case was tried to a jury. The jury returned a verdict. The federal court entered judgment on the jury's verdict. After judgment was entered, the plaintiffs filed several post-trial motions. While these motions

were pending, the plaintiffs filed a motion to remand for lack of diversity jurisdiction on the ground that the USAA was an unincorporated association with members in Mississippi. The defendant had to agree. The federal court granted the motion, vacated its judgment, and remanded the case. The question now, is how to proceed.

When a case is remanded from the federal courts, state law controls the effect to be given to the proceedings in federal court and how state court should proceed. *Ayres v. Wiswall*, 112 U.S. 187, 190-91 (1884); *Williams v. St. Joe Mineral Corp.*, 369 S.W.2d 192, 194 (Mo. App. 1982); *Edward Hansen, Inc. v. Kearny Post Office Associates*, 399 A.2d 319, 321, 166 N.J. Super. 161 (N.J. Super. 1979); *Bolder v. Brazile*, 172 So. 2d 304, 310 (La. App. 1965) (and cases cited therein).

Thus, if a state wishes to do so, it may give effect to some or all of the proceedings in the federal court. *See e.g. Hansen*, 399 A.2d at 321 (discussing various cases where state courts gave effect to federal pleadings); *Citizens National Bank of Grant County v. First National Bank in Marion*, 331 N.E.2d 471, 476, 165 Ind.App. 116 (Ind. App. 1975) (after remand, state court could (illegible) *Cotton*, 269 S (illegible) at 424.[1]

Mississippi apparently has not considered where to begin in state court after remand. The only case that mentions the matter, *Germania Fire Ins. Co. v. Francis*, 52

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[1] Other courts have held to the contrary. *Federal Deposit Insurance Corp. v. National Surety Corp.*, 281 N.W.2d 616 (Iowa 1979): *New York City v. New York Jets Football Club*, 304 N.Y.S.2d 799 (N.Y.Sup. 1977); *see also* 76 C.J.S. *Removal of Causes section* (illegible)

Miss. 457 (1876), does not directly address the effect to be given to federal proceedings. In *Germania*, the appellant argued that the case in circuit court was discontinued by its removal to federal court. Under the rules of common law pleading, a discontinuance was similar to a dismissal for failure to prosecute. The Court held that the removal to federal court had the effect of delaying, rather than discontinuing, the proceedings in circuit court and, when the case was remanded, the circuit court could proceed with the case as though removal had not occurred. Although the Court's language could be taken to suggest that the case should proceed in remand in the same posture it was in when removed, the Court's holding was clearly concerned with whether Francis' case should have been dismissed for failure to prosecute. The Court was not considering whether a state court as a rule should proceed where the federal court left off.

As noted in *Hansen* and *Cotton*, however, a federal court on removal would give effect to any proceedings that had taken place in the Mississippi courts before the case was removed. As in Georgia, Mississippi's rules of civil procedure mirror the federal rules. Thus, logic and comity would both suggest that Mississippi should follow the lead of *Williams*, 369 S.W.2d at 194, and *Hansen*, 399 A.2d at 323, and give effect to proceedings that have taken place in the federal courts before the case is remanded.

The District Court for the Northern District of Mississippi held extensive proceedings in this case, up to and including a jury trial on the merits. The proceedings in federal court spanned three years.

The post-trial motions still pending will provide an opportunity for the plaintiffs to address any perceived unfairness in their trial before Judge Senter.

Mississippi should adopt a rule that a case remanded from the federal courts to Mississippi courts proceeds in the same procedural posture that it left the federal courts. That result would be the most logical, economical, expeditious, and fair way to resolve the plaintiffs claims. They have had their day in court.

The Court should enter a summary judgment based on the outcome of the trial in federal court, unless the plaintiffs' post-trial motions merit a new trial.

Respectfully submitted, this 15 day of December, 1989.

HOLCOMB, DUNBAR,
CONNELL, CHAFFIN
& WILLARD
P.O. Drawer 707
Oxford, MS 38655
(601) 234-8775

BY: /s/ John H. Dunbar
JOHN H. DUNBAR

EXHIBIT S-1

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION CVS

NORTH CAROLINA

CURRITUCK COUNTY

UNITED SERVICES AUTOMOBILE ASSOCIATION, Plaintiff, v. ANITA M. JELKS, Defendant.	)	COMPLAINT

The plaintiff, seeking a declaratory judgment pursuant to N.C.G.S. Sec. 1-253 *et. seq.* with respect to the controversies hereinafter set forth, alleges and says that:

1. The plaintiff, United Service Automobile Association (hereinafter "USAA"), is a corporation organized and existing under the laws of the State of Texas and is duly licensed and authorized to do business and was doing business in North Carolina at all times referred to herein.

2. The plaintiff USAA is informed and believes that the defendant Anita M. Jelks is a citizen and resident of Currituck County, North Carolina.

3. The plaintiff USAA is informed and believes and therefore alleges that on or about August 19, 1986 at

approximately 9:24 a. m., defendant Anita M. Jelks was traveling by automobile on Princess Ann Road in Virginia Beach, Virginia when she took an evasive maneuver to avoid a head-on collision with a phantom vehicle traveling from the opposite direction.

* * *

EXHIBIT S-2

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION

UNITED SERVICES
AUTOMOBILE ASSOCIATION,

Plaintiff CIVIL ACTION NO. ___

v.

ANITA M. JELKS,

Defendant

PETITION FOR REMOVAL

Defendant, Anita M. Jelks, petitions this Court pursuant to 28 U.S.C., Section 1441(a) and 28 U.S.C., Section 1332(a)(1), fo [sic] removal of the action brought against her in the General Court of Justice, Superior Court Division, for the County of Currituck, North Carolina, by

United Services Automobile Association, File Number 88-CVS-220. In support if this Petition, defendant states

1. Plaintiff filed a Complaint against defendant in the General Court of Justice, Superior Court Division, for the County of Currituck, North Carolina, on or about October 13, 1988, a copy of which Complaint is attached hereto and by this reference made part hereof.

2. On or about October 17, 1988, a Civil Summons and Complaint were served on defendant, Anita M. Jelks.

3. This Petition for Removal is timely filed under 28 U.S.C., Section 1446(b).

4. At the time of the commencement of this action, at the filing of this Petition, and at all times mentioned herein, defendant, Anita M. Jelks, was a resident and citizen of the State.

* * *

EXHIBIT S-3

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT IF NORTH CAROLINA
ELIZABETH CITY DIVISION
CIVIL ACTION NO. 88-58-CIV-2

UNITED SERVICES AUTOMOBILE ASSOCIATION, Plaintiff, v. ANITA M. JELKS, Defendant.	REPLY TO COUNTERCLAIM

NOW COMES The plaintiff reply to the Counterclaim against it by defendant and alleges and says:

FIRST DEFENSE

This court lacks subject matter jurisdiction of this matter removed to Federal Court by the defendant purportedly pursuant to Title 28, U.S.C. Sec. 1332 on the grounds of diversity of citizenship and amount in controversy. There is no diversity of citizenship because, contrary to as alleged in the Complaint which is the subject of a proposed amendment, plaintiff is an unincorporated association with its principal place of business in Texas, and is duly authorized to do business with and has members in North Carolina, so there is no diversity of citizenship between plaintiff and defendant who is a citizen and resident of North Carolina.

SECOND DEFENSE

The Counterclaim against plaintiff fails to state a claim upon which relief can be granted and should be dismissed.

* * *

EXHIBIT S-4

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
ELIZABETH CITY DIVISION
CIVIL ACTION NO. 88-58-CIV-2

UNITED SERVICES AUTOMOBILE ASSOCIATION, Plaintiff, v. ANITA M. JELKS, Defendant.	PROPOSED AMENDMENT TO COMPLAINT

NOW COMES the plaintiff United Services Automobile Association and amends paragraph one of its Complaint to allege and say as follow:

1. Plaintiff is organized and existing as an unincorporated insurance association with its principal place of business in Texas, with members in North Carolina and

was authorized to do business in North Carolina at all times referred to herein.

This the 14th day of December, 1988.

YOUNG, MOORE, HENDERSON & ALVIS, P.A.

By /s/ Evelyn M. Coman
Evelyn M. Coman
Attorneys for Plaintiff
P.O. Box 31627
Raleigh, North Carolina 27622
(919) 782-6860

EXHIBIT S-5

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT
OF NORTH CAROLINA
ELIZABETH CITY DIVISION

NO. 88-58-CIV-2

UNITED SERVICES AUTOMOBILE ASSOCIATION, Plaintiff, vs. ANITA M. JELKS, Defendant.	)	MOTION TO REMAND

NOW COMES the plaintiff United Services Automobile Association and moves the court pursuant to Rule 7 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1447 to remand this action to state court on the basis

that diversity of jurisdiction between the parties does not exist. In support thereof the plaintiff shows the court that it is an unincorporated insurance association with members in North Carolina and defendant is a resident and citizen of Currituck County, North Carolina.

WHEREFORE, the plaintiff moves the court to remand this action to state court in Currituck County, North Carolina where it was instituted by plaintiff since there is no federal jurisdiction over this action due to a lack of diversity of citizenship between the parties.

This the 19th day of January, 1989.

YOUNG, MOORE, HENDERSON
& ALVIS, P.A.

BY: /s/ Evelyn M. Coman
EVELYN M. COMAN
Attorneys for Plaintiff
Post Office Box 31627
Raleigh, North Carolina
27622
919/782-6860

* * *

has members in North Carolina. Defendant is a citizen and resident of North Carolina and has been at all times that is the subject of this action. It has long been recognized that an unincorporated association is a citizen of each state of its constituent members. See, *Chapman v. Barney*, 129 U.S. 677, 9 S.Ct. 426, 32 L.Ed. 800 (1889). The courts since *Chapman* look to determine citizenship of all members of the unincorporated association in determining whether diversity between parties exists to confer jurisdiction on the federal court. *Arbuthnot v. Automobile*

Ins. Ass'n, 264 F.2d 260 (10th Cir. 1959); *Retirement System v. Kalkus*, 764 F.2d 1015 (4th Cir. 1985).

USAA has been recognized as an unincorporated insurance association and is considered to be a citizen in every state in which it has members such that if it is a party to a lawsuit with any member whose state citizenship coincides, the federal district court has no diversity. *Baer v. USAA*, 859 F.2d 842 (2nd Cir. 1974), *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988). As the court noted in *Baer*, USAA is an inter-insurance exchange whose insureds are referred to by the company as members. USAA has members in North Carolina so is considered to be a citizen of North Carolina. Since both USAA and Mrs. Jelks are citizens of North Carolina, there is no diversity of citizenship between the parties and the case should be remanded to state court for lack of federal jurisdiction.

* * *

EXHIBIT ST

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

UNITED SERVICES AUTOMOBILE ASSOCIATION, Plaintiff V. *JEREMY AREY,* Serve at: 3114 Fincastle Turnpike Tazewell, Virginia 24651, *OLIVIA DIANE ALTIZER,* Administratrix of the Estate of William Bennett Altizer, Deceased, Serve at: Route 3 Box 157A Tazewell, Virginia 24651 *VIRGINIA FARM BUREAU MUTUAL INSURANCE COMPANY,* Serve: Evelyn F. John, Reg. Agent 200 West Grace Street Richmond, Virginia 23261 *STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,* Serve: Brian K. Carlson, Reg. Agent 1500 State Farm Blvd. Charlottesville, Virginia 22909 Defendants	Civil Action No. 89-0139-A

COMPLAINT
(Filed July 31, 1989)

1. Plaintiff, United Services Automobile Association (USAA), is a citizen of Texas by virtue of its being incorporated under Texas law and by virtue of having its principal place of business in Texas.

2. Defendants Jeremy Arey (Arey) and Olivia Diane Altizer (Altizer), Administratrix of the Estate of William Bennett Altizer, Deceased, are citizens of Virginia.

3. Defendant Virginia Farm Bureau Mutual Insurance Company (Virginia Farm Bureau) is a citizen of Virginia by virtue of its being incorporated under Virginia law and by virtue of having its principal place of business in Virginia.

4. Defendant State Farm Mutual Automobile Insurance Company (State Farm) is a citizen of Illinois by virtue of its being incorporated under Illinois law and by virtue of having its principal place of business in Illinois.

5. The amount in controversy, exclusive of interest and costs, exceeds $50,000.00.

6. This Court has jurisdiction of this case pursuant to 28 U.S.C. § 1332.

7. Virginia Farm Bureau issued a liability insurance policy (the VFB Policy) to Thornton Newlon, covering the use by certain persons of a 1986 Honda CRX automobile (the Newlon Vehicle) owned by him. The VFB Policy was in effect at all times relevant to this action.

8. USAA issued a liability insurance policy (the USAA Policy) to Arey's father, covering certain persons.

The limits of the liability coverage are $100,000.00 per person and $200,000.00 per accident. The USAA Policy was in effect at all times relevant to this action.

9. State Farm issued an insurance policy to William Bennett Altizer's father, providing uninsured motorist (UM) coverage to certain persons, including William Bennett Altizer. The policy issued by State Farm was in effect at all times relevant to this action.

10. On or about June 4, 1989, the Newlon Vehicle was involved in an accident (the Accident) in Tazewell County, Virginia, that resulted in the death of William Bennett Altizer.

* * *

EXHIBIT T

Stephen J. Laskero, Esq.
HAASIS, POPE & CORRELL, A.P.C.
101 W. Broadway, Suite 1130
San Diego, California 92101
Telephone (619) 236-9933

Attorneys for Plaintiff,
UNITED SERVICES AUTOMOBILE ASSOCIATION,
A RECIPROCAL INTERINSURANCE EXCHANGE

UNITED STATES DISTRICT COURT OF CALIFORNIA

SOUTHERN DISTRICT, CIVIL DIVISION

UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTERINSURANCE EXCHANGE, Plaintiff, v. WILLIAM S. STRYKER, M.D., an individual; MARY I. STRYKER, an individual; WILLIAM S. STRYKER, M.D., a professional corporation, Defined Benefit Pension Plan; MARY FRANCES BLACKMAN, and individual, MARK E. BLACKMAN, an individual, MOCCAS, INC., a California corporation, Inclusive. Defendants.	CASE NO. 862272S(IEG) COMPLAINT FOR DECLARATORY RELIEF 28:2201

Plaintiff, United Services Automobile Association, a reciprocal interinsurance exchange, with its principal

place of business in San Antonio, Texas, complains against defendants, and each of them, and alleges as follows:

1. At all material times herein, plaintiff, United Services Automobile Association (hereinafter referred to as "USAA") was and is a reciprocal interinsurance exchange with its principal place of business in San Antonio, Texas. The plaintiff was and is authorized by the insurance commissioner of the State of California to engage in the practice of writing insurance in the State of California; and was and is engaged in said business in the State of California, County of San Diego.

2. Plaintiff alleges on information and belief that at all material times herein, defendant, William S. Stryker, M.D., is an individual who is a citizen of the State of California for diversity purposes.

3. Plaintiff alleges on information and belief that at all material times herein, defendant, Mary I. Stryker, is an individual who is a citizen of the State of California for diversity purposes.

4. Plaintiff alleges on information and belief that at all material times herein, defendant, William S. Stryker, M.D., a Professional Corporation Defined Benefit Pension Plan, is a pension plan organized and existing under the laws of the State of California, and is a citizen of the State of California for diversity purposes.

5. Plaintiff alleges on information and belief that at all material times herein, defendant, Mary Frances Blackman, aka Bambi Blackman, is an individual who is a citizen of the State of California for diversity purposes.

6. Plaintiff alleges on information and belief that at all material times herein, defendant, Mark E. Blackman, is an individual who is a citizen of the State of California for diversity purposes.

7. Plaintiff alleges on information and belief that at all material times herein, defendant, Moccas, Inc., was and is a California corporation organized and existing under the laws of the State of California, and qualified to do business in the County of San Diego, with its principal place of business in the State of California and is a citizen of the State of California for diversity purposes.

8. This Declaratory Relief Action is brought under 28 U.S.C. Section 2201 and Rule 57 of the Federal Rules of Civil Procedure. The jurisdiction of this court is based on diversity of citizenship existing between the parties. The matter in controversy exceeds the sum of $15,000.00, exclusive of interest and costs.

9. A suit was filed in the Superior Court of the State of California on May 21, 1985 and amended on February 20, 1986, alleging misrepresentations, fraud, breach of fiduciary duty, negligent trust management and professional negligence. A Summons and Complaint have been served on the defendants therein and the case is pending before the Superior Court of the State of California.

10. Venue is proper in this district under Section 28 U.S.C. Section 1391, in that an actual controversy exists and the claim arose in the County of San Diego, State of California.

* * *

EXHIBIT II-I

EZRA, O'CONNOR & MOON
Attorneys at Law
A Law Corporation

MICHAEL F. O'CONNOR 1098-0
220 South King Street
20th Floor, Central Pacific Plaza
Honolulu, Hawaii 96813
Telephone: 545-3030

Attorneys for UNITED SERVICES
AUTOMOBILE ASSOCIATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas corporation, Plaintiff, vs. EARL W. AH MOO, D.D.S., AMERICAN DENTAL PLAN, INC., a Hawaii corporation, ARGONAUT MIDWEST INSURANCE COMPANY, an Illinois corporation, DENTAGUARD, INC., a Hawaii corporation, M.F. CONSULTANTS, INC., a Hawaii corporation and FRANKLIN TOM, D.D.S., dba Diversified Dental Services, Defendants.	CIVIL NO. 85 illegible COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF; EXHIBIT "A"; SUMMONS (Filed June 4, 1985)

COMPLAINT FOR DECLARATORY JUDGMENT AND OTHER RELIEF

Comes now UNITED SERVICES AUTOMOBILE ASSOCIATION, a Texas corporation (hereinafter referred to as USAA) for a complaint against Defendants above named, to allege and to aver as follows:

FIRST CAUSE OF ACTION

1. This action is of a civil nature brought pursuant to 28 U.S.C. § 1332. The amount in controversy, exclusive of interest and costs, is a sum in excess of $10,000 and every issue of law and fact herein is wholly between citizens of different states.

2. Plaintiff is a corporation duly organized and existing under the laws of the State of Texas, with its principal place of business in San Antonio, Texas and is hereinafter referred to as "USAA".

3. Defendant EARL W. AH MOO, D.D.S. is domiciled in and a citizen of the State of Hawaii, is licensed to practice dentistry in the State of Hawaii and is hereinafter referred to as "AH MOO".

4. Defendant AMERICAN DENTAL PLAN, INC. is a corporation duly organized and existing under the laws of the State of Hawaii with its principal place of business in Honolulu, Hawaii.

5. Defendant DENTAGUARD, INC. is a corporation duly organized and existing under the laws of the State of Hawaii with its principal place of business in Honolulu, Hawaii.

6. Defendant M. F. CONSULTANTS, INC. is a corporation duly organized and existing under the laws of the State of Hawaii, with its principal place of business in Honolulu, Hawaii.

* * *

EXHIBIT II-2

EZRA, O'CONNOR, MOON & TAM
Attorneys at Law
A Law Corporation

MICHAEL F. O'CONNOR 1098-0
BRIAN K. YOMONO 2423-0
MICHAEL M. McKONE 3995-0
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Attorneys for Plaintiff
UNITED SERVICES AUTOMOBILE ASSOCIATION

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

UNITED SERVICES AUTOMOBILE ASSOCIATION, Plaintiff, vs. EARL W. AH MOO, D.D.S., AMERICAN DENTAL PLAN, INC., a Hawaii corporation, ARGONAUT MIDWEST INSURANCE COMPANY, an Illinois corporation, M.F. CONSULTANTS, INC., a Hawaii corporation and FRANKLIN TOM, D.D.S., dba Diversified Dental Service, Defendant.	CIVIL NO. 85-0523 SCHEDULING CONFERENCE STATEMENT; CERTIFICATE OF SERVICE DATE: April 4, 1986 TIME: 2:00 p.m. JUDGE: Daral G. Conklin (Filed Mar. 27, 1986)

df/275

SCHEDULING CONFERENCE STATEMENT

COMES NOW Plaintiff UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), by and through its attorneys, EZRA, O'CONNOR, MOON & TAM, and hereby submits this Scheduling Conference Statement pursuant to Rule 16 of the Federal Rules of Civil Procedure and Local Rule 235-3(b) of the Rules of the United States District Court for the District of Hawaii.

1. *Service of Process of Parties not yet Served.* All necessary and indispensable parties have been served.

2. *Jurisdiction and Venue.* Jurisdiction of this Court is proper for the following reasons:

a. The amount in controversy exceeds $10,000.00; and

b. There is diversity of citizenship between Plaintiff USAA (incorporated and principal place of business in San Antonio, Texas) and Defendants EARL W. AH MOO (citizen and domiciled in Hawaii); American Dental Plan (incorporated and principal place of business in Hawaii); Dentaguard, Inc. (incorporated and principal place of business in Hawaii); M.F. Consultants (incorporated and principal place of business in Hawaii); Franklin Tom, (citizen and domiciled in Hawaii); Argonaut Midwest Insurance Co. (incorporated and principal place of business in Illinois).

Venue is proper in this Court because the claim arose in Hawaii.

EXHIBIT V-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

LINDA MUCHA	PLAINTIFF
VERSUS	CIVIL ACTION NO. S87-
USAA (United Service Automobile Association)	DEFENDANT

COMPLAINT

COMES NOW The Plaintiff, Linda Mucha, through her attorney, Joe Sam Owen, and complains of the Defendant to-wit:

I.

The Plaintiff is an adult resident citizen of the State of Mississippi, residing in Gulfport, Harrison County, Mississippi.

II.

The Defendant, United Service Automobile Association (USAA), is a foreign corporation organized and existing under and by virtue of the laws of the State of Texas, with principal offices located in the USAA Building, San Antonio, Texas. At all material times mentioned herein the Defendant issued or caused to be issued a certain automobile policy providing uninsured motorist/underinsured motorist coverage for two vehicles. Further, at all

material times mentioned herein the Defendant was licensed to do business within the State of Mississippi.

III.

* * *

EXHIBIT V-2

STATE OF MISSISSIPPI
COUNTY OF HARRISON

AFFIDAVIT OF ATTORNEY

I, Joe Sam Owen, of lawful age being first duly sworn, depose and state as follows:

1. I was attorney of record for the plaintiff in the case of *Linda Mucha v. United Services Automobile Association*, Civil Action No. S87-0569(G), filed on September 10, 1987, in the United States District Court for the Southern District of Mississippi.

2. The basis of the trial court's jurisdiction was diversity of citizenship. The nature of the action for suit was breach of insurance contract. The defendant admitted diversity jurisdiction.

3. During the course of the proceedings, the defendant, USAA, admitted that it was a foreign corporation with principal offices in Texas. USAA did not attempt to dismiss the action for lack of jurisdiction over the subject matter in the absence of complete diversity.

4. The case was settled and dismissed by agreement of the parties on May 16, 1989.

Further affiant sayeth not.

/s/ Joe Sam Owen
JOE SAM OWEN

SWORN TO AND SUBSCRIBED BEFORE ME, this 30 day of October , 1989.

/s/ Deborah A. Butler
NOTARY PUBLIC

EXHIBIT W-1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

SYLVIA HUNTER VAUGHN	PLAINTIFF
VERSUS	NO. EC 84-412
UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTER-INSURANCE EXCHANGE	DEFENDANT

COMPLAINT

(Filed Dec. 12, 1984)

Comes now Sylvia Hunter Vaughn, plaintiff in the above-styled and numbered cause, by and through her attorneys of record, and files this her Complaint against United Services Automobile Association, a Reciprocal Inter-Insurance Exchange, defendant, and says:

FIRST CAUSE OF ACTION

1. Plaintiff is an adult citizen of Lowndes County, Mississippi.

2. The defendant, United Services Automobile association (hereinafter "USAA"), is a non-resident reciprocal inter-insurance exchange of the State of Mississippi, created, organized and existing under and by virtue of the laws of the State of Texas, * which is domiciled and has its principal place of business in * State of Texas and in no other State.

3. This Court has jurisdiction of this action pursuant to U.S.C.A. § 1332(a)(1) in that the matter in controversy exceeds sum or value of ten thousand dollars ($10,000.00), exclusive interest and cost and is between citizens of different states.

On October 25, 1983, and at all times thereafter, USAA ensed* and qualified to do business within the State of Mississippi and was actively engaged, by and through its authorities, in soliciting and insuring risks within the State of Mississippi.

On October 25, 1983, USAA, by and through its duly * agent, issued a standard form automobile liability policy to Francis M. Vaughn, Jr., bearing policy number * 7101.0. Said contract of insurance provided liability * the named insured, Francis M. Vaughn, Jr., on one * International Scout pickup truck and one (1) 1983 Pontiac automobile. The contract of insurance provided initial * six-month term beginning on October 25, 1983, and April 25, 1984. A true and correct copy of the contract * attached

---

* Copy missing.

hereto for the reason that the * or misplaced, but the defendant, USAA,

* * *

EXHIBIT W-2

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

SYLVIA HUNTER VAUGHN — PLAINTIFF

VERSUS — NO. EC 84-413.

UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTER-INSURANCE EXCHANGE — DEFENDANT

COMPLAINT

(Filed Dec. 12, 1984)

Comes now Sylvia Louise Vaughn, plaintiff in the above-styled and numbered cause, by and through her attorneys of record, and files this her Complaint against United Services Automobile Association, a Reciprocal Inter-Insurance Exchange, defendant, and says:

FIRST CAUSE OF ACTION

1. Plaintiff is an adult citizen of Lowndes County, Mississippi.

2. The defendant, United Services Automobile Association (hereinafter "USAA"), is a non-resident reciprocal inter-insurance exchange of the State of Mississippi, created, organized and existing under and by virtue of the laws of the State of Texas, and which is domiciled and has its principal place of business in the State of Texas and in no other State.

3. This Court has jurisdiction of this action pursuant to 28 U.S.C.A. § 1332(a)(1) in that the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000.00), exclusive of interest and cost and is between citizens of different states.

4. On October 25, 1983, and at all times thereafter, USAA was licensed and qualified to do business within the State of Mississippi and was actively engaged, by and through its authorized agents, in soliciting and insuring risks within the State of Mississippi.

5. On October 25, 1983, USAA, by and through its duly authorized agent, issued a standard form automobile liability insurance policy to Francis M. Vaughn, Jr., bearing policy number 028 10 81U 7101 0. Said contract of insurance provided liability insurance for the named insured, Francis M. Vaughn, Jr., on one (1) International Scout pickup truck and one (1) 1983 Pontiac Grand Prix automobile. The contract of insurance provided initial coverage for a six-month term beginning on October 25, 1983, and ending on April 25, 1984. A true and correct copy of the contract of insurance is not attached hereto for the reason that the same has been lost, destroyed or misplaced, but the defendant, USAA,

* * *

EXHIBIT W-3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

FRANCIS M. VAUGHN, IV — PLAINTIFF

VERSUS — NO. EC 84-414-LS-D

UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTER-INSURANCE EXCHANGE — DEFENDANT

COMPLAINT

(Filed Dec. 12, 1984)

Comes now Francis M. Vaughn, IV, plaintiff in the above-styled and numbered cause, by and through his attorneys of record, and files this his Complaint against United Services Automobile Association, a Reciprocal Inter-Insurance Exchange, defendant, and says:

FIRST CAUSE OF ACTION

1. Plaintiff is an adult citizen of Lowndes County, Mississippi.

2. The defendant, United Services Automobile Association (hereinafter "USAA"), is a non-resident reciprocal inter-insurance exchange of the State of Mississippi, created, organized and existing under and by virtue of the laws of the State of Texas, and which is domiciled and has its principal place of business in the State of Texas and in no other State.

3. This Court has jurisdiction of this action pursuant to 28 U.S.C.A. § 1332(a)(1) in that the matter in controversy exceeds the sum or value of ten thousand dollars ($10,000.00), exclusive of interest and cost and is between citizens of different states.

4. On October 25, 1983, and at all times thereafter, USAA was licensed and qualified to do business within the State of Mississippi and was actively engaged, by and through its authorized *ents, in soliciting and insuring risks within the State of Mississippi.

5. On October 25, 1983, USAA, by and through its duly authorized agent, issued a standard form automobile liability insurance policy to Francis M. Vaughn, Jr., bearing policy number 0 81U 7101 0.* Said contract of insurance provided liability nce* for the named insured, Francis M. Vaughn, Jr., on one International Scout pickup truck and one (1) 1983 Pontiac rix* automobile. The contract of insurance provided initial * for a six-month term beginning on October 25, 1983, and on April 25, 1984. A true and correct copy of the contract nce* is not attached hereto for the reason that the same * lost, destroyed or misplaced, but the defendant, USAA,

* * *

EXHIBIT 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

SYLVIA HUNTER VAUGHN — PLAINTIFF

VERSUS — NO. EC 84-412-LS-D

UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTER-INSURANCE EXCHANGE — DEFENDANT

ANSWER AND DEFENSES OF
UNITED SERVICES AUTOMOBILE ASSOCIATION

Now comes the United Services Automobile Associa-tion, endant* herein, and files this answer and defenses to the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendant * which any relief can be granted.

SECOND DEFENSE

Defendant pleads a late notice, a breach in the policy * and which is sued on, in that the accident allegedly * on October 25, 1983, and it received no notice of the t* until November 14, 1984, when it received a letter from * for the plaintiff, dated November 6, 1984. That, as a ce,* a letter of reservation of rights has been issued hree* members of the Vaughn family, which have individually *

3. The Defendant admits that it is a non-resident insurance corporation of the State of Mississippi which is qualified to do and is doing business in the State of Mississippi and that plaintiffs have demanded judgment in excess of $10,000, exclusive of interest and costs. Defendant denies the remaining allegations contained in paragraph 3.

4. The Defendant admits the allegations contained in paragraph 4.

5. The Defendant admits the allegations contained in paragraph 5.

6. The Defendant admits the allegations of paragraph 6 subject to the provisions of the policy itself, which speaks for itself.

7. The Defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 7.

8. On information and belief, the Defendant admits that on or about December 14, 1983, Francis M. Vaughn, Jr. was driving and operating a motor vehicle in a northerly direction over and along Alabama State Highway No. 17 near Sulligent, Alabama, approaching the Bartahatchie River Bridge. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 8.

9. The Defendant is without knowledge or information

* * *

EXHIBIT W-5

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

SYLVIA LOUISE VAUGHN	PLAINTIFF
VERSUS	NO. EC 84-413-LS-D
UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTER-INSURANCE EXCHANGE	DEFENDANT

ANSWER AND DEFENSES OF
UNITED SERVICES AUTOMOBILE ASSOCIATION

Now comes the United Services Automobile Association, defendant herein, and files this answer and defenses to the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendant upon which any relief can be granted.

SECOND DEFENSE

Defendant pleads a late notice, a breach in the policy issued and which is sued on, in that the accident allegedly occurred on October 25, 1983, and it received no notice of the accident until November 14, 1984, when it received a letter from counsel for the plaintiff, dated November 6, 1984. That, as a consequence, a letter of reservation of rights has been issued to the three members of the Vaughn family, which have individually *

* * *

3. The Defendant admits that it is a non-resident insurance corporation of the State of Mississippi which is qualified to do and is doing business in the State of Mississippi and that plaintiffs have demanded judgment in excess of $10,000, exclusive of interest and costs. Defendant denies the remaining allegations contained in paragraph 3.

4. The Defendant admits the allegations contained in paragraph 4.

5. The Defendant admits the allegations contained in paragraph 5.

6. The Defendant admits the allegations of paragraph 6 subject to the provisions of the policy itself, which speaks for itself.

7. The Defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 7.

8. On information and belief, the Defendant admits that on or about December 14, 1983, Francis M. Vaughn, Jr. was driving and operating a motor vehicle in a northerly direction over and along Alabama State Highway No. 17 near Sulligent, Alabama, approaching the Bartahatchie River Bridge. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 8.

9. The Defendant is without knowledge or information

* * *

EXHIBIT W-6

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI

EASTERN DIVISION

FRANCIS M. VAUGHN, IV — PLAINTIFF

VERSUS — NO. EC 84-414-LS-D

UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTER-INSURANCE EXCHANGE — DEFENDANT

ANSWER AND DEFENSES OF
UNITED SERVICES AUTOMOBILE ASSOCIATION

Now comes the United Services Automobile Association, defendant herein, and files this answer and defenses to the Complaint as follows:

FIRST DEFENSE

The Complaint fails to state a claim against defendant upon which any relief can be granted.

SECOND DEFENSE

Defendant pleads a late notice, a breach in the policy issued and which is sued on, in that the accident allegedly occurred on October 25, 1983, and it received no notice of the accident until November 14, 1984, when it received a letter from counsel for the plaintiff, dated November 6, 1984. That, as a consequence, a letter of reservation of rights has been issued to the three members of the Vaughn family, which have individually

* * *

3. The Defendant admits that it is a non-resident insurance corporation of the State of Mississippi which is qualified to do and is doing business in the State of Mississippi and that plaintiffs have demanded judgment in excess of $10,000, exclusive of interest and costs. Defendant denies the remaining allegations contained in paragraph 3.

4. The Defendant admits the allegations contained in paragraph 4.

5. The Defendant admits the allegations contained in paragraph 5.

6. The Defendant admits the allegations of paragraph 6 subject to the provisions of the policy itself, which speaks for itself.

7. The Defendant avers that it is without knowledge or information sufficient to form a belief as to the truth of the averment in paragraph 7.

8. On information and belief, the Defendant admits that on or about December 14, 1983, Francis M. Vaughn, Jr. was driving and operating a motor vehicle in a northerly direction over and along Alabama State Highway No. 17 near Sulligent, Alabama, approaching the Bartahatchie River Bridge. The Defendant is without knowledge or information sufficient to form a belief as to the truth of the remaining averments of paragraph 8.

9. The Defendant is without knowledge or information

* * *

EXHIBIT W-7

STATE OF MISSISSIPPI)
)
COUNTY OF Montgomery)

AFFIDAVIT OF ATTORNEY

I, William Liston, of lawful age being first duly sworn, depose and state as follows:

1. I was attorney of record for the plaintiffs in the case of *Sylvia Hunter Vaughn v. United Services Automobile Association,* Case No. 84-412, (see Complaint, Exhibit "A"), the case of *Sylvia Louise Vaughn v. United Services Automobile Association,* Case No. 84-413, (see Complaint, Exhibit "B"), and the case of *Francis M. Vaughn IV v. United Services Automobile Association,* Case No. 84-414, (see Complaint, Exhibit "C"), filed on December 12, 1984, in the United States District Court for the Northern District of Mississippi, and for the defendants in the case of *United Services Automobile Association v. Sylvia Hunter Vaughn, as Administratrix of the Estate of Francis M. Vaughn, Sylvia Hunter Vaughn, Sylvia Louise Vaughn, and Francis M. Vaughn IV,* Case No. 86-16 (see Complaint, Exhibit "D"), and filed on January 14, 1986, in the same court. These cases were subsequently consolidated.

2. The basis of the trial court's jurisdiction in cases 84-412, 84-413, and 84-414, as pled by the plaintiffs Sylvia Hunter Vaughn, et al., in good faith, was diversity of citizenship pursuant to 28 U.S.C. 1332 (see Exhibits "A", "B" and "C"). The nature of the action was suit on insurance contract for contractual damages and claims ex delicto for breach of contract. The basis of the trial court's jurisdiction in Case No. 86-16 as pled by United Services

Automobile Association was likewise diversity of citizenship pursuant to 28 U.S.C. 1332 (see Exhibit "D"). The nature of the action was complaint for interpleader on uninsured motorist coverage.

3. The status of United Services Automobile Association (USAA) was clearly set forth in the pleadings, including the Complaint filed by USAA (see Exhibit "D"), to be that of a reciprocal interinsurance exchange. Nevertheless, neither in a Motion to Dismiss nor in its Answer (see Exhibit "E", "F" and "G"), nor in any other pleading did USAA raise as a defense the lack of subject matter jurisdiction by the trial court over the lawsuit due to lack of diversity because USAA was an unincorporated association with members in the plaintiffs' home state.

4. The Motion for Summary Judgment (see Exhibit "H") filed by USAA in the consolidated cases involved a substantive state law question concerning UM stacking and was unrelated to any diversity question. The trial court granted the Motion and the cases were dismissed (see Order, Exhibit "F").

Further affiant sayeth not.

/s/ William Liston
William Liston

Subscribed and sworn to before me this 6th day of Oct. 1989.

/s/ Linda A. Tompkin
Notary Public

My Commission Expires:

4-19-91

EXHIBIT W-8

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

UNITED SERVICES AUTOMOBILE ASSOCIATION, A RECIPROCAL INTER-INSURANCE EXCHANGE — PLAINTIFF

V. — CIVIL ACTION NO. ___

SYLVIA HUNTER VAUGHAN, AS ADMINISTRATRIX OF THE ESTATE OF FRANCIS M. VAUGHAN, JR.
SYLVIA HUNTER VAUGHAN, INDIVIDUALLY,
SYLVIA LOUISE VAUGHAN, INDIVIDUALLY,
AND FRANCIS M. VAUGHAN, IV — DEFENDANTS

COMPLAINT FOR INTERPLEADER AND DECLARATORY JUDGMENT

The plaintiff, United Services Automobile Association (hereinafter "USAA"), files this complaint for interpleader pursuant to Rule 22 of the Federal Rules of Civil Procedure, and for declaratory judgment pursuant to Rule 57 of the Federal Rules of Civil Procedure, and states as follows to the Court:

I.

PARTIES

1. USAA is a reciprocal inter-insurance exchange which is organized and existing under the laws of the State of Texas with its principal place of business in the State of Texas.

a. Sylvia Hunter Vaughan, as the Administratrix of the Estate of Francis M. Vaughan, Jr., is an adult resident citizen of Lowndes County, Mississippi.

3. Sylvia Hunter Vaughan, individually, is an adult resident citizen of Lowndes County, Mississippi.

4. Sylvia Louise Vaughan, individually, is an adult resident citizen of Lowndes County, Mississippi.

5. Francis M. Vaughan, IV, individually, is an adult resident citizen of Lowndes County, Mississippi.

II.

JURISDICTION

6. This Court has jurisdiction of this matter under 28 USC §§ 1332 and 1441 pursuant to complete diversity of citizenship between the plaintiff and all of the defendants in this case.

III.

INTERPLEADER

7. USAA issued an automobile insurance policy to Francis M. Vaughan, Jr., with coverage effective from October 25, 1983 to April 25, 1984. A copy of Policy Number 028 10 81U 7101 0 showing Mr. Francis M. Vaughan, Jr. as the named insured is attached as Exhibit "A" to this Complaint.

8. This automobile insurance policy issued by USAA covered two separate vehicles, a 1974 International Scout II and a 1983 Pontiac Grand Prix.

9. As shown on the policy declaration page under "Part C – Uninsured Motorists" the policy provided

limits bodily injury in the amount of $50,000 for each person suffering bodily injury and $100,000 for each accident.

* * *

EXHIBIT X

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

LEROY TUCK, Administrator of the Estate of JOHNNY L. TUCK, Deceased; LEROY TUCK, an individual and DOROTHY TUCK, an individual,	)	
Plaintiffs,	)	
vs.	)	No. 83-C-175-C
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Defendant.	)	

DEFENDANT USAA'S BRIEF IN SUPPORT OF RESPONSE MOTION FOR SANCTIONS AND CROSS-MOTION FOR SANCTION

COMES NOW the defendant, USAA, and submits the following brief in response to the plaintiffs' motion for sanctions, and in support of its cross-motion for sanctions.

Statement of facts

The "Introduction" to plaintiff's brief, equivalent to a "Statement of Facts" is simply a diatribe against USAA, based upon an incorrect perception of the facts, upon "20/20 hindsight", and upon conclusory allegations unsupported by *any* facts. The "Introduction" also completely ignores the responsibility of plaintiffs (through counsel, a duly licensed and practicing attorney who is *presumed* to know the law) to properly *plead* and *prove* subject matter jurisdiction in the action which they voluntarily filed in the federal court. Specifically, the plaintiffs' "Introduction" contains blatant misstatements of the status of the proceedings below. Contrary to the assertion in the brief, it was *never* contended nor proved that USAA *ever* denied the plaintiff's claim under the insurance policy. As was stated by Mr. Carr in a conference with the court at the outset of trial * * * : complaints in two unrelated cases filed in such far-flung jurisdictions as Pennsylvania and Alabama. The disposition of neither of these cases is revealed to the court, and if neither were dismissed before final judgment, it is the fault of both plaintiff and defendants, as well as an oversight by the courts, which also have an obligation to inquire into their own jurisdiction.

It should be added here that *USAA v. Weuppa*, CV86AR5072NW, resulted in final judgment in November 1987 after an appeal to the Eleventh Circuit Court of Appeals on the merits. USAA won. After consulting with Attorney Carr, plaintiffs counsel has, in that case, filed a motion for relief from the judgment – something of which Attorney Carr fails to advise the court. *See* Exhibit "B"

attached hereto. Defendant USAA is prepared to controvert by affidavit of counsel or otherwise in that case, any allegation of misconduct on the part of USAA.

While bearing in mind that the plaintiff has the obligation to properly plead and prove that jurisdiction exists, the number of times that USAA has been sued in the Western District of Oklahoma, and the problems faced by counsel in attempting to obtain dismissals of those cases, even post-*Tuck*, may be revealing of the number of courts and counsel which are simply unaware, as were plaintiffs, of the nature of USAA and its jurisdictional ramifications. It is the practice of USAA's counsel in the Western District of Oklahoma to raise the questions of subject matter jurisdiction in each appropriate case filed against USAA in Federal Court. *See, Brooks v. USAA,* CIV-86-848-BT (W.D. Okla. 1986); *Choate v. USAA,* (W.D. Okla. 1985); *Miller v. USAA,* CIV-88-1236-P (W.D. Okla. 1988; *Caplinger v. Gates,*

* * *

EXHIBIT Y-1

05/21/84
DWE:mm

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Reciprocal Interinsurance Exchange,	)	
Plaintiff,	)	
v.	)	No. CIV-84 1275-E
SCOTT ROBELEN, an Individual,	)	
Defendant.	)	

COMPLAINT

(Filed illegible)

COMES NOW the plaintiff, United Services Automobile Association, and for its cause of action against the defendant, Scott Robelen, states:

I.

That the plaintiff, United Services Automobile Association, is a reciprocal interinsurance exchange organized and existing under the laws of the State of Texas, with its principal place of business in San Antonio, Texas; that the defendant, Scott Robelen, is a citizen of the State of Oklahoma residing in Norman, Oklahoma. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs. Jurisdiction is vested in this Court by reason of diversity of citizenship between the parties.

* * *

EXHIBIT Y-2

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

11/16/84
DWE:mm

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Reciprocal Interinsurance Exchange,	)	
Plaintiff,	)	
v.	)	No.
SCOTT ROBELEN, an Individual,	)	CIV-84 1275-E
Defendant.	)	

PRE-TRIAL CONFERENCE MEMORANDUM

(Filed Nov. 19, 1984)

Date of Conference: November 19, 1984, at 2:45 P.M.

Appearances: John C. Niemeyer and David W. Edmonds
NIEMEYER, EDMONDS, NOLAND, ALEXANDER & HARGRAVE
Three Hundred North Walker
Oklahoma City, OK 73102
(405) 232-2725

ATTORNEYS FOR PLAINTIFF, UNITED SERVICES AUTOMOBILE ASSOCIATION

Ben T. Lampkin
LAMPKIN, WOLFE,
McCAFFREY
& TAWWATER
Suite 245, Century Center
Oklahoma City, OK 73102
(405) 272-9611

ATTORNEYS FOR
DEFENDANT,
SCOTT ROBELEN

I. STIPULATIONS:

A. All parties are properly before the Court.

B. The Court has jurisdiction of the parties and the subject matter.

C. All parties have been correctly designated.

D. There is no question as to misjoinder or non-joinder of parties.

E. *Facts:*

1. Plaintiff is a reciprocal interinsurance exchange, organized and existing under the laws of the State of Texas.

2. The parties cannot stipulate as to the residency and citizenship of the defendant, Scott Robelen, with regard to a specific state; however, they can stipulate that he is not a resident or citizen of the State of Texas. Therefore, there is diversity of citizenship between the parties.

3. The amount in controversy exceeds Ten Thousand Dollars ($10,000.00), exclusive of interest and costs.

4. On September 3, 1983, at approximately 4:15 A.M., the defendant, Scott Robelen, was a

passenger in a vehicle driven by Jay Bass on Highway 88, 1.3 miles south of Stigler, Oklahoma. Said vehicle ran off the roadway, and turned over and skidded on its top.

* * *

EXHIBIT Y-3

09/14/84
DEW:MM

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

UNITED SERVICES AUTOMOBILE ASSOCIATION, a Reciprocal Interinsurance Exchange,	)	
Plaintiff,	)	
v.	)	No.
SCOTT ROBELEN, an Individual,	)	CIV-84 1275-E
Defendant.	)	

NOTICE OF CHANGE OF FIRM NAME

(Filed Sept. 14, 1984)

COMES NOW the plaintiff, United Services Automobile Association, and advises the Court, all counsel of record, and all other concern parties that the law firm of FOLIART, MILLS & NIEMEYER, which has heretofore been named as law firm of record, was dissolved on July 1, 1984. On the same date the new firm of NIEMEYER,

EDMONDS, NOLAND, ALEXANDER & HARGRAVE was formed consisting of the following attorneys:

John C. Niemeyer	Linda Alexander
David W. Edmonds	John R. Hargrave
Michael L. Noland	Greg D. Givens

One or more of the above-named attorneys has been principally involved in the handling of this litigation to date and will continue to do so in the future. Therefore, from this date forward all correspondence,

* * *

EXHIBIT Z-1

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF OKLAHOMA

SANDRA A. RUTH, surviving spouse of FRANCIS DEAN RUTH, Plaintiff,	)	
VS.	)	NO. CIV-85 913
UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	)	

COMPLAINT

(Filed Apr. 8, 1985)

COMES now the Plaintiff, Sandra A. Ruth, and for her causes of action against the Defendant, herein alleges and state:

JURISDICTION

I.

The Plaintiff, Sandra A. Ruth, is a citizen and resident of the State of Oklahoma; and, the Defendant, United Services Automobile Association, is a foreign corporation organized and existing under and by virtue of the laws of the State of Texas, with its principal place of business in a state other than the State of Oklahoma, and is currently doing business in the State of Oklahoma. Sandra A. Ruth is the surviving spouse of Francis Dean Ruth. Further, the amount in controversy herein exceeds the sum of Ten Thousand and No/100 ($10,000.00) exclusive of interest and costs and this Court has jurisdiction pursuant to the provisions of 28 U.S.C. Section 1332.

* * *

EXHIBIT Z-2

GDG:mwc
5/8/85

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SANDRA A. RUTH, surviving spouse of FRANCIS DEAN RUTH, Plaintiff,	)	
v.	)	Case No.
UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	)	CIV-85-913-T

ANSWER OF DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION

(Filed May 10, 1985)

For answer to plaintiff's Complaint, defendant, United Services Automobile Association, alleges and states:

I

The defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations and claims contained in paragraphs I and II of plaintiff's Complaint and therefore denies the same.

II

The defendant is without knowledge or information sufficient to form a belief as to the truth of those allegations and claims contained in paragraph III of plaintiff's Complaint and therefore denies the same. The defendant admits that an accident occurred on the date and at the time mentioned in paragraph III of the Complaint and that one vehicle was being operated by Edsel Conrad Brumley while the other vehicle was operated by Francis Dean Ruth.

* * *

EXHIBIT Z-3

GDG:mwc
9/16/85

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF OKLAHOMA

SANDRA A. RUTH, surviving spouse of FRANCIS DEAN RUTH, Plaintiff,	)	
v.	)	Case No.
UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	)	CIV-85-913-T

MOTION OF DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION, TO DISMISS OR IN THE ALTERNATIVE FOR A CHANGE OF VENUE

(Filed illegible)

COMES NOW the defendant, United Services Automobile Association, pursuant to Rule 19 of the Federal Rules of Civil Procedure and respectfully moves the Court to dismiss the plaintiff's Complaint on the grounds that an indispensable party has not and cannot be joined in the present action. In the alternative, said defendant respectfully moves pursuant to Title 28 U.S.C.A. § 1404 for a change of venue to the district or division where plaintiff's cause of action might have been brought.

Respectfully submitted,

By /s/ Greg D. Givens
David W. Edmonds and
Greg D. Givens
of

NIEMEYER, EDMONDS,
NOLAND, ALEXANDER
& HARGRAVE
Three Hundred North Walker
Oklahoma City, Oklahoma 73102
Telephone: (405) 232-2725

ATTORNEYS FOR SAID DEFENDANT

EXHIBIT Z-4

WLN:ef
3/25/86

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF OKLAHOMA

SANDRA A. RUTH, surviving spouse of FRANCIS DEAN RUTH, Plaintiff,	)	
v.	)	Case No.
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	CIV-85-913-T
Defendant.	)	

MOTION TO DISMISS

(Filed March 31, 1986)

COMES NOW the defendant, United Services Automobile Association, pursuant to F.R.C.P. 12 (b) (l) and 28 U.S.C. 1332 (C) moves the Court dismiss this action on grounds that this Court lacks jurisdiction. In support of this Motion, defendant states the following:

This Complaint was filed in Federal Court on the grounds of diversity of citizenship. The defendant, United Services Automobile Association, is not a corporation, but is a reciprocal insurance exchange whose membership consists of members in many states. It is an unincorporated association. A substantial number of the members of the defendant, United Services Automobile Association, are citizens of, and domiciled in, the State of Oklahoma. The plaintiff, Sandra A. Ruth, is a member of such association, and is a citizen and resident of the State of Oklahoma. The requisite diversity of citizenship between plaintiff and defendant does not exist. Therefore this Court is without jurisdiction.

* * *

EXHIBIT AA

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

LEROY TUCK, Administrator of the Estate of JOHNNY L. TUCK, Deceased; LEROY TUCK, an individual and DOROTHY TUCK, an individual,	) Case NO. 85-2770) (Appealed from the) U.S. District Court of) Oklahoma/Northern,) Case No. 83-C-175-C)
Appellees,	
vs.	
UNITED SERVICES AUTOMOBILE ASSOCIATION, a corporation,	
Appellant.	

APPELLANT'S BRIEF IN REPLY TO APPELLEES' "PRELIMINARY RESPONSE"

NIEMEYER, NOLAND & ALEXANDER

Linda G. Alexander – OBA No. 000195
Three Hundred North Walker
Oklahoma City, Oklahoma 73102
Telephone: (405) 232-2725

ATTORNEYS FOR THE APPELLANT.

October, 1986

STATEMENT OF FACTS

Plaintiffs brought this action in the United States District Court for the Northern District of Oklahoma. The allegations against United Services Automobile Association (USAA) contained in plaintiffs' Complaint include an allegation that USAA breached its contract of uninsured motorist coverage and exercised bad faith in refusing to settle the claim. The "uninsured" or "underinsured" motorist involved in the accident was an Oklahoma resident, whose joinder would have destroyed diversity. He was not sued.

The plaintiffs' jurisdictional allegation against the defendant United Services Automobile Association was only that the defendant was a "foreign corporation".

Defendant's trial counsel filed an Answer failing to deny the jurisdictional allegations. The issue of the trial court's subject matter jurisdiction was never raised at the trial level. There is a total lack of evidence of any attempt by United Services Automobile Association, at trial,

before trial or otherwise, to conceal its citizenship and status as an unincorporated association.

Separate counsel was retained by the defendant United Services Automobile Association for the purpose of prosecuting this appeal. Good practice required a complete review of the action, including the issue of subject matter jurisdiction. This review called United Services Automobile Association's attention to the jurisdictional defect. Had USAA not raised the issue here, of course it would have been the appellate court's duty to examine the jurisdictional issues, to determine both its jurisdiction and the jurisdiction of the district court.

EXHIBIT BB

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

IVA JEAN HOLCOMB and CURTIS HOLCOMB, Husband and Wife,	)	
Plaintiffs,	)	
vs.	)	Civil Action
DONALD DAVIS and JACKIE DAVIS, Husband and Wife; and UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	85-C-652-E
Defendants.	)	

PLAINTIFF'S ORIGINAL COMPLAINT

(Filed July 11, 1986)

COME NOW the Plaintiffs, and for support of their complaint allege and state as follows:

I

That the Plaintiffs are residents of the State of Oklahoma, living in Tulsa, Oklahoma, and the Defendants Donald and Jackie Davis are residents of the State of Texas, living in Grand Prairie, Texas; and the Defendant United Services Automobile Association is an insurance corporation incorporated under the laws of and having its principal place of business in, the State of Texas, and diversity of citizenship exists between the parties. Further, that the amount in controversy herein exceeds Ten Thousand and No/100 Dollars ($10,000.00), exclusive of costs and interest. That this is a cause of action arising from the tortious conduct of the Defendants and the tortious acts occurred in Dallas County, Texas. This court is vested with jurisdiction and venue to adjudicate the matters involved in this action under the provisions of 28 U.S.C. §§1332.

FIRST CAUSE OF ACTION

COMES NOW the Plaintiff, Iva Jean Holcomb, and in support of her first cause of action against Defendants Donald and Jackie Davis, alleges and states as follows:

I

That Defendant, Donald Davis, is and was at all times material hereto the owner of the Chrysler automobile his wife and co-defendant, Jackie Davis, was operating at the time of the accident hereinafter set forth and policy holder of the insurer and co-defendant, United Services Automobile Association.

II

That on April 30, 1982, the Plaintiff, Iva Jean Holcomb, was a passenger in the Chrysler automobile owned by Donald Davis and being operated by Jackie Davis. Defendant, Jackie Davis, attempted to make a left turn from a side street onto the Northwest Freeway (near Love Field) in Dallas County, Texas, when she caused said automobile to become trapped crossways in the oncoming lane of traffic. An approaching station wagon hit the automobile driven by Defendant, Jackie Davis, broadside, striking

* * *

EXHIBIT CC-1

IN THE UNITED STATES
DISTRICT COURT IN AND FOR
THE NORTHERN DISTRICT OF OKLAHOMA

UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	
Plaintiff,	)	
vs.	)	
JEFFERY SANDHOLM, FRANK A. SANDHOLM, and BETTY L. DOWLAND, now DOUGLAS,	)	
Defendants.	)	CASE NO. 85-C-112 B

COMPLAINT

(Filed Febr. 7, 1985)

Comes now the plaintiff, United Services Automobile Association, a Texas corporation, and for its cause of action against the defendants, alleges and states as follows:

I.

That United Services Automobile Association is a Texas corporation, licensed as an insurance corporation, with its principal place of business in San Antonio, Texas. That it is licensed to do business in the State of Oklahoma. That the defendants, Jeffery Sandholm, Frank Sandholm, and Betty L. Dowland, now Douglas, are individuals who are residents of the State of Oklahoma. That this Court has jurisdiction of the parties hereto, and the action herein pursuant to 28 U.S.C., section 1332, there

being complete diversity of citizenship between the plaintiff and all the defendants herein. That the amount in controversy exceeds $10,000.00. That this is an action for declaratory judgment filed pursuant to 28 U.S.C., section 2201.

II.

That United Services Automobile Association issued its policy of insurance, policy 013 25 044 7101 2 to the defendant, Frank A. Sandholm, said policy of insurance being effective from March 11, 1983 to September 11, 1983, said policy of insurance providing liability insurance coverage on a 1976 Dodge pickup owned by Frank A. Sandholm. A copy of said policy of insurance is attached hereto as Exhibit "A", and incorporated herein as if the same were fully set forth herein.

III.

That allegedly as a result of negligence on the part of one Jeffery Sandholm, while driving the said 1976 Dodge pickup owned by Frank Sandholm, an accident occurred on or about the 11th day of March, 1983, and as a result thereof, a lawsuit has been filed in the District Court in and for Creek County, Drumright Division, State of Oklahoma, styled Betty L. Dowland, now Douglas, plaintiff, vs. Jeffery Sandholm and Frank Sandholm, defendants, case number C-84-73-D. Said lawsuit alleges that Jeffery Sandholm was driving the 1976 Dodge pickup, owned by

Frank Sandholm, at the time of said accident. A copy of said Petition filed in

* * *

EXHIBIT CC-2

Easy Reading HOMEOWNERS POLICY

Quick Reference

DECLARATIONS PAGE

Your Name
Location of Your Residence
Policy Period
Coverages
Amounts of Insurance
Deductible

Beginning On Page

1 AGREEMENT

1 DEFINITIONS

SECTION I – YOUR PROPERTY

2 COVERAGES

Property Coverages
Loss of Use
Additional Coverages
Debris Removal
Trees, Shrubs and Plants
Credit Card

4 PERILS INSURED AGAINST

6 EXCLUSIONS

6 CONDITIONS

Insurable Interest
Duties After Loss
Loss Settlement
Mortgage Clause

SECTION II – YOUR LIABILITY

9 COVERAGES

Personal Liability
Medical Payments to Others

9 EXCLUSIONS

10 ADDITIONAL COVERAGES

Claim Expenses
First Aid Expenses
Damage to Property Of Others

11 CONDITIONS

Limit of Liability
Duties After Loss

SECTION I and SECTION II

12 CONDITIONS

Policy Period
Cancellation
Non-Renewal

STATE EXCEPTIONS

PLEASE NOTE: THERE ARE MASSACHUSETTS AMENDTORY [SIC] ENDORSEMENT(S).

THIS IS A NEW EASY TO READ POLICY. PLEASE READ YOUR POLICY. THERE ARE SOME COVERAGE

CHANGES. IF THERE ARE ANY QUESTIONS, CALL YOUR AGENT OR COMPANY RIGHT AWAY.

Part One

This Policy is incomplete unless it is issued with a Declarations Page. "PART TWO" and endorsements, if any.

POLICY SUMMARY

READ YOUR POLICY CAREFULLY

This is a legal contract between you, the policyholder and us, your insurer. And like other contracts, it contains duties and responsibilities.

This policy insures your home and other structures located on and appertaining to your residence premises. In addition, this policy gives you coverage for your personal property and provides financial protection when you are held liable for damage to the property of others or for injury to others – both on and off your property. These coverages are subject, however, to those limitations and restrictions specifically identified and further explained where necessary. The causes of loss or damage to your personal property which this policy insures against are also specifically identified and further explained where necessary.

There is an index to help you readily locate that portion of the policy dealing with any questions you may have.

We have tried to make this policy easy to read and understand. But should you need clarification on some point, we will be glad to provide it.

PROVISIONS APPLICABLE TO

United Services Automobile Association
(A Reciprocal Interinsurance Exchange)

A non-assessable policy

- Reciprocals
- Special definitions and provisions
- Plan of operation

In your policy these sets of words have the same meaning: Policy means Contract, You, Your or Insured means Subscriber. We, us, our, USAA or Company means Reciprocal or Interinsurance Exchange; Premium means Deposit; President means Attorney-in-Fact.

Your policy is issued as part of an Interinsurance Exchange by the President of USAA as Attorney-in-Fact under the authority given him by the subscribers.

No Contingent Liability: You are liable only for the amount of your premium since USAA has a free surplus in excess of the amount required by Article 19.03 of the Texas Insurance Code of 1951, as amended.

Participation: By purchasing this policy, you are a member of USAA and subject to its bylaws. You are entitled to dividends as may be declared by us, after

approval as required by the Texas Insurance Code of 1951, as amended.

Witness Whereof, we have caused this policy to be signed by our president and secretary at San Antonio, Texas.

/s/ illegible
president

/s/ illegible
secretary

EXHIBIT GG

STATE OF OKLAHOMA)
)
COUNTY OF TULSA)

AFFIDAVIT OF ATTORNEY

I, E. Terrill Corley, of lawful age being first duly sworn, depose and state as follows:

1. I was attorney of record for the defendant, Betty L. Dowland, now Douglas, in the case of *United Services Automobile Association v. Jeffery Sandholm, Frank A. Sandholm, and Betty L. Dowland, now Douglas,* case no. 85-C-112-B, filed on February 17, 1985, in the United States District Court for the Northern District of Oklahoma.

2. The basis of the trial court's jurisdiction was diversity of citizenship. The nature of the action was suit for declaratory judgment.

3. At no time during the course of the proceedings did the plaintiff, United Services Automobile Association, allege that it was an unincorporated association or

attempt to dismiss the action for lack of jurisdiction over the subject matter in the absence of complete diversity.

4. Summary judgment was granted in favor of the plaintiff on December 31, 1985.

Further affiant sayeth not.

/s/ E. Terrill Corley
E. Terrill Corley

Subscribed and sworn to before me this 21st day of Nov. 1989.

/s/ Carolyn N. Baird
Notary Public

My Commission Expires: 3-7-93

EXHIBIT DD

AFFIDAVIT

STATE OF TEXAS :

COUNTY OF BEXAR :

Before me, the undersigned authority, on this day personally appeared JOHN L. SWYERS, known to me, and being first duly sworn, desposes [sic] and states the following, to wit:

I am JOHN L. SWYERS, of lawful age, residing in the State of Texas. I am employed by United Services Automobile Association as Vice President-Associate General Counsel/Assistant Secretary.

In the above-stated capacity, I affirm that United Services Automobile Association (USAA) is a reciprocal interinsurance exchange, domiciled in Texas, and licensed under chapter 19 of the Texas Insurance Code. USAA is licensed to do business as a property/casualty insurer in all fifty states, as well as certain foreign locations, and has over 1.2 million policyholders.

As a reciprocal, USAA is owned by its policyholders who, through their premiums, contribute the necessary capital. Profits are returned to the policyholders through policy dividends and allocations to Subscriber's Savings Accounts (said allocated funds are paid to the policyholder whenever he or she terminates all policies). Operationally, USAA can be said to function much like a mutual insurer.

USAA is managed by a Board of Directors, elected by the policyholders at an annual meeting. Operational management is by a President, who is also the Attorney-in-Fact, and several Vice Presidents. The Association's headquarters are located in San Antonio, Texas in its own building which houses approximately 5800 employees. Approximately 800 employees are located in field service offices in several other states.

USAA is the parent company in an insurance holding company system regulated under Article 21.49-1 of the Texas Insurance Code. USAA owns all the stock of several subsidiary Texas insurance and financial service corporations.

Attached hereto are copies of Chapter 19 and Article 21.49-1 of the Texas Insurance Code. Also attached is a

pamphlet entitled "USAA Bylaws" which I certify to be a true and correct copy of the Association's current Bylaws.

The undersigned is competent to make this Affidavit and understands it will be used as evidence in the case of HENRY A. PRIDGEN, As Next Friend for HENRY A. PRIDGEN, III, A Minor vs. U.S.A.A.; U. S. District Court No. 84-247-ALB-AMER, Middle District of Georgia.

/s/ John L. Swyers
JOHN L. SWYERS

Subscribed and sworn to before me this 27th day of November 1984.

/s/ Loretta C. Lanicek
LORETTA C. LANICEK
Notary Public
Bexar County, Texas

My commission expires 11/30/88

EXHIBIT EE

AFFIDAVIT

STATE OF TEXAS

COUNTY OF BEXAR

Before me, the undersigned official, on this day appeared John L. Swyers, who is personally known to me, and first being duly sworn according to law upon his oath deposed and said:

My name is John L. Swyers, I am over 18 years of age. I have never been convicted of a crime, and I am fully competent to make this affidavit. I have personal knowledge of the facts stated herein, and they are all true and correct.

I am Vice President, General Counsel of United Services Automobile Association (USAA). Among my duties is to assure that policies of insurance issued by USAA comply with statutory requirements of all fifty (50) states.

Each USAA member is required to sign a Subscriber's Agreement and Power of Attorney which adopts by reference the Bylaws of the Exchange. While these Bylaws allow issuance of either assessable or nonassessable policies, it is the business practice of USAA to issue only nonassessable policies to our members in all fifty (50) states. Such insurance contracts are in compliance with statutory requirements in each state in that regard.

Further affiant sayeth naught.

/s/ John L. Swyers
John L. Swyers

Subscribed and sworn to before me on the 19th day of September, 1989 to certify which witness my hand and official seal.

/s/ Loretta C. Lanicek
Notary Public in and
for the State of Texas
My Commission expires 11/30/92

SEAL

EXHIBIT FF

COPY

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF
WASHINGTON AT SEATTLE

RAY HOLIDAY and SANDRA HOLIDAY, husband and wife, and the marital community comprised thereof, Plaintiffs, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	NO. C87-1281 AFFIDAVIT OF John L. Swyers, IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR LACK OF JURISDICTION (Filed Nov. 10, 1987)

STATE OF Texas)
) ss.
COUNTY OF Bexar)

John L. Swyers, begin first duly sworn on oath, deposes and says:

1. My position with United States Automobile Association ("USAA") is that of VP, Gen. Counsel. I am over the age of twenty-one and competent to testify as to the following facts.

(Illegible) USAA is a reciprocal interinsurance exchange. It issued to the plaintiffs a homeowner's policy 25592 62-92a. Under provisions of the policy issued by USAA, by purchasing the policy, an insured becomes a member of the reciprocal interinsurance exchange which

USAA comprises and is subject to its bylaws. Attached as Exhibit 1 is a section of the policy specifically setting forth these terms.

3. USAA is an unincorporated association. In addition to Mr. Holiday, it has numerous members who have been issued homeowner's policies in the State of Washington which are currently in effect.

/s/ John L. Swyers
VP Assoc. Gen. Counsel
Insurance

STATE OF Texas

COUNTY OF Bexar

SIGNED AND SWORN to (or affirmed) before me on October 29, 1987 by John L. Swyers

/s/ Loretta C. Lanicek
Notary Public
My appointment expires
11/30/88

[Pages A-366 - A-369 intentionally left blank in printing]

EXHIBIT GG

NO. 87-12328

KATHLEEN ST. JOHN, ET AL Plaintiffs/Counter-Defendants VS. USAA CASUALTY INSURANCE COMPANY Defendant/ Counter-Plaintiff	*	IN THE DISTRICT COURT 134TH JUDICIAL DISTRICT DALLAS COUNTY, TEXAS

THE ORAL DEPOSITION OF
ROBERT A. WHEELESS

JUNE 6, 1989

DUPLICATE

BRUCE SLAVIN
CERTIFIED SHORTHAND REPORTER

___ Cost Due From Plaintiffs
Reference No.: 891740BS

ROBERT A. WHEELESS,

the Witness, having been first duly cautioned and sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

DIRECT EXAMINATION

By Mr. St. John:

Q Will you please state your name?

A Robert A. Wheeless. Last name is W-h-e-e-l-e-s-s.

Q Mr. Wheeless, you are now employed by USAA. Is that right?

A Correct.

Q How long have you been employed by USAA?

A October, 1974.

Q Are you now – Tell me what your job description is now – your job title.

A I'm vice-president of claims systems.

Q And what are your duties as vice-president of claim systems?

A I provide – I create, develop and maintain systems support for the P&C claims operation at USAA.

Q And "P&C" would be "property and casualty"?

A "Property and casualty."

Q Approximately how many people report directly to you?

A Directly to me?

* * *

[p. 43] retrieve, litigation cases being handled by USAA?

A Not that I know of. In claims we carry a – one indicator that says a file is in suit. "Suits pending" is what it's called. That is the only indicator in the entire claims system that there's any litigation.

Q Is that fielded information?

A Uh-huh.

Q If you wanted to, could you run out a list of every case that's now pending?

A Yes.

Q Could you restrict such a case to cases pending now in a particular state?

A Yes; current state. It's the way claims systems carries it, by current state.

Q I meant state of the Union.

A Yes. No. What I meant by that statement was some people have base-state information and other people have current-state – occurrence – where the occurrence appeared. And that's the way claims works. Wherever the accident or the loss occurred that's the state which we carry in the claims system. And on that basis, if you wanted to know the suits pending by a current state, I have that information.

[p. 44] Q. Okay.

A It's fielded.

Q So, that wouldn't tell me where the suit was pending, but where the loss occurred?

A Right. I guess by reading the file you could obtain the rest of it.

Q Do you know whether or not anyone within the legal department has authorization to access all or part of the property in claims systems?

A No.

Q You don't know?

A I do know. That's contained in security tables, and someone would have to look at those and see who's authorized what. I don't know.

Q Have you ever had any experiences at USAA that indicated to you that one of the in-house attorneys had access to your system, personally – in other words, did not have to request that information of someone working in property claims?

A I do not know that there are attorneys that are working in the claims department that are claims litigators that have access to the claims system.

Q I want to make sure I'm not missing a step.

A Okay.

Q Is it true, then, that any one of those attorneys

* * *

EXHIBIT HH

BEST'S

KEY RATING GUIDE

PROPERTY CASUALTY

1991 Edition

A_M BEST

The Insurance Information Source™

BEST'S

KEY RATING GUIDE
PROPERTY-CASUALTY

1991 Edition
Published continuously since 1906
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A.M. BEST COMPANY
Oldwick, New Jersey 08858 •
(908) 439-2200 • Fax: (908) 439-3363

BEST'S KEY RATING GUIDE – PROPERTY CASUALTY EDITION
ANNUAL STATEMENT DATA FOR YEARS 1986 – 1990

Company Name (Group Affiliation) Principal Officer Mailing Address Began Bus. Structure * Specialty Phone # AMB # * #	Year	Balance Sheet: Cash & Short-Term Invest. (%)	Stocks and Bonds (%)	All Other Assets (%)	Total Admitted Assets ($000)	Loss Reserves (%)	Unearned Prem. (%)	All Other Liab. (%)	Total Liabilities ($000)	Policyholders Surplus ($000)	Operations: Direct Premiums Written ($000)	Net Premiums Written ($000)	Business Net Retention (%)	Net Underwriting Income ($000)	Net Investment Income ($000)	Net Operating Income Before Tax ($000)	Net Income ($000)	Change Policyholders Surplus ($000)
UNITED	'86	23.8	70.4	5.8	277,162	66.6	25.1	8.3	193,866	83,296	424,771	121,478	22.2	-23,727	18,648	1,079	-1,887	25,458
PACIFIC	'87	4.2	83.3	12.5	327,316	62.5	23.4	14.1	211,580	115,736	390,534	120,252	23.5	-2,081	23,060	20,990	14,836	*
INSURANCE	'88	2.5	88.9	8.6	400,992	63.1	26.3	10.7	225,103	175,889	357,135	133,538	27.2	-11,208	22,782	11,574	10,770	*
CO.	'89	8.6	93.2	6.2	519,380	66.8	21.2	12.1	253,331	265,970	294,745	136,831	31.7	-10,705	30,328	20,123	18,043	*
(Reference Insurance Group) Dean W. Case, President & CEO 4 Penn Center Plaza Philadelphia, PA 19103 1928 Stock Agency Personal Auto, Commercial Lines 206-952-5000 02537 24473	'90	1.3	93.9	4.3	550,558	72.6	21.6	5.7	250,845	299,712	269,849	140,244	34.2	-11,420	29,201	17,782	-4,172	*

*Illegible

UNITED PACIFIC INS CO OF NY (* Insurance Group) Dean W. Case, President & COO 4 Penn Center Plaza Philadelphia, PA 19103 1978 Stock Agency Personal Auto. Commercial Lines 215-864-4000 03798 36471	'86	16.5	71.7	11.8	58,397	72.5	20.2	7.3	44,416	13,981	13,971	27,211	66.1	-7,106	4,263	-2,843	-2,611	*
	'87	4.7	88.5	6.7	60,207	73.0	18.5	8.5	44,298	15,909	13,501	24,064	64.1	761	5,055	5,817	3,345	1,327
	'88	6.1	89.3	4.6	65,147	78.3	19.6	2.1	47,828	17,319	14,581	27,689	65.5	-5,263	5,238	-25	-113	1,410
	'89	0.0	92.7	7.3	69,573	74.8	22.0	1.2	50,620	18,953	13,730	25,030	64.6	-970	6,838	5,868	2,487	1.6
	'90	0.0	94.2	5.8	68,588	78.0	15.2	6.8	52,645	15,943	15,944	21,066	56.9	-4,393	5,250	857	-2,798	-1.0
UNITED REINS CORP OF NY (Reinsurance Corp of NY Group) Robert M. *, President 80 Madison Lane New York, NY 10038 1977 Stock Agency Reinsurance Ocean Marine 212-363-4440 03728 34908	'86	14.7	77.7	7.6	30,116	58.3	31.7	10.0	14,831	15,285	2,437	16,034	75.0	15	1,400	1,415	1,852	2.0
	'87	7.9	85.7	6.4	39,353	69.5	25.4	5.1	15,733	23,620	3,080	13,548	68.2	2,287	1,838	4,126	3,271	8.3
	'88	6.8	88.3	5.0	64,837	72.2	21.0	6.8	17,936	26,901	3,841	13,210	71.2	773	2,417	3,190	2,686	1,281
	'89	8.9	86.3	4.8	49,548	69.6	18.0	12.5	19,971	29,577	4,911	11,755	62.9	-1,434	2,925	1,490	3,125	2,676
	'90	7.8	87.9	4.3	48,943	73.0	14.2	12.8	20,414	28,529	5,867	10,014	58.8	-1,669	2,921	1,252	1,454	-*

*Illegible

UNITED	'86	11.0	78.3	10.7	26,032	31.0	63.7	5.3	1,257	24,775	...	1,465	100.0	-523	858	335	693	24,775
REPUBLIC	'87	20.6	73.9	5.5	36,218	50.1	48.8	1.1	9,580	26,639	...	13,866	97.4	-1,568	2,249	681	1,455	1.*
REINSURANCE	'88	29.4	66.5	4.1	46,126	69.6	29.2	1.2	15,546	30,580	...	17,365	99.2	540	3,204	3,745	3,640	1.*
CO	'89	41.0	49.3	9.7	57,053	55.8	39.6	4.5	26,969	30,083	...	20,912	99.8	-3,284	4,169	885	218	*
(Lawrence Insur-	'90	56.6	28.4	15.0	76,742	65.7	18.4	15.9	46,185	30,558	...	39,165	81.3	830	4,914	5,795	1,570	474
ance Group)																		
A. Wayne Peter-																		
son, Chm &																		
President																		
5718 Westerner,																		
Suite 1310																		
Houston, TX																		
77057																		
1986 Stock																		
Broker																		
Reinsurance																		
713-975-6810																		
00545 29220																		
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UNITED SECU-	'86	83.2	14.7	2.1	1,052	13.6	76.7	9.8	799	253	1,725	1,294	75.0	-47	59	12	12	*
RITY ASSUR	'87	79.3	17.9	2.8	1,538	27.2	64.4	8.4	1,224	313	2,257	1,748	7.74	-14	81	67	67	*
CO OF PA	'88	85.1	12.5	2.3	2,399	25.6	66.1	8.3	1,761	638	3,243	2,321	71.6	1	138	139	79	*
(No Group Affil-	'89	91.0	8.2	0.8	3,557	31.7	55.8	12.5	2,744	813	4,258	3,218	75.6	33	241	274	188	*
iation)	'90	71.6	26.3	2.1	4,123	37.1	57.1	5.8	3,252	871	5,281	4,187	79.3	31	323	354	59	*
Ronald A.																		
Landers, Presi-																		
dent																		
P.O. Box 99																		
Southern, PA																		
18964-9972																		
1982 Stock																		
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01850 42129																		
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*Illegible

UNITED SECURITY INS CO (USUCO Corporation Group) Charles R. Floy, President P.O Box 1848 Des Mones, IA 50306-1848 1946 Stock Agency Personal Lines, Commercial Lines 515-222-4000 00932 21776	'86	11.8	73.1	15.0	37,244	59.7	33.6	6.7	26,652	10,591	29,339	28,212	95.6	-281	2,733	2,451	4,295	*
	'87	7.8	76.7	15.5	37,546	58.8	32.9	8.3	28,545	9,001	31,010	29,776	96.3	-3,887	2,559	-1,328	-1,233	-1*
	'88	8.0	78.7	13.3	42,865	57.0	35.8	7.2	31,944	10,920	30,445	30,744	43.5	131	2,778	2,909	2,554	1,919
	'89	4.6	81.1	14.3	45,772	57.1	35.9	7.0	34,648	11,124	29,097	31,817	52.0	-808	3,134	2,325	1,519	*
	'90	73	778	14.9	48,966	55.0	37.1	7.9	39,051	9.915	29,478	34,924	53.9	-2,540	3,130	589	679	-1*
UNITED SERVICES AUTO ASSN (USAA Group) Robert F. McDermont, President 9800 Fredericksburg Road, USAA Building San Antonio, TX 78288 1922 Reco Direct Personal Auto, Homeowners 512-498-2211 00934 25941	'86	2.4	75.6	22.0	3,541,508	60.0	30.9	9.1	1,835,691	1,705,817	1,610,210	1,633,314	99.3	-83,692	171,854	88,162	183,971	218,411
	'87	0.9	77.4	21.7	4,090,069	59.9	29.1	11.0	2,196,795	1,893,274	1,868,812	1,395,950	99.3	-21,266	191,659	172,393	321,357	187,41*
	'88	0.2	77.2	22.6	4,651,842	61.9	28.0	10.1	2,412,557	2,239,286	2,018,006	2,059,691	99.3	-18,338	199,691	181,353	226,141	346,*
	'89	0.5	75.5	24.0	5,306,308	63.0	27.2	9.8	2,653,634	2,652,673	2,153,772	2,197,098	99.3	-73,074	214,415	141,340	211,884	413,387
	'90	0.7	75.0	24.4	5,650,683	63.2	26.8	10.0	2,910,822	2,739,861	2,339,952	2,380,783	99.2	-158,195	191,054	32,860	65,069	87,188

*Illegible

UNITED SOUTHERN ASSURANCE CO (No Group Affiliation) Richard P. Love, Jr., President P.O. Box 2648 Melbourne, FL 32902-2648 1958 Stock Agency Commercial Auto 407-984-2941 01974 23256	'86	16.2	67.6	16.2	9,924	14.5	16.9	68.7	2,755	7,170	1,897	1,713	90.3	-164	474	310	327	7,170
	'87	29.4	46.5	24.1	22,572	38.0	24.5	37.5	12,651	9,921	17,570	13,284	75.6	292	790	1,082	1,103	2,752
	'88	51.0	39.0	9.9	48,829	52.4	16.6	31.3	33,500	15,329	40,632	29,069	71.5	-1,950	1,984	35	3	*
	'89	25.6	62.9	11.5	75,674	58.2	12.7	29.1	59,188	16,486	70,768	44,625	63.1	-3,201	4,470	1,269	507	*
	'90	17.1	66.3	16.6	66,105	92.0	4.7	3.3	60,425	5,680	59,364	39,959	67.3	-8,276	5,172	-3,104	-3,230	-10,806

*Illegible

UNITED STATES FID & GUAR CO (United States Fidelity & Guaranty Group) Norman P. Blake, Jr., Chm & President P.O. Box 1138 Baltimore, MD 21203 1896 Stock Agency Automobile, Commercial Lines 301-547-3000 02539 25887	'86	10.9	69.3	19.9	7,025,483	65.1	23.7	11.3	5,785,578	1,239,905	2,727,471	3,562,035	88.0	-381,598	487,563	105,965	187,639	326,*
	'87	7.4	71.1	21.5	7,682,000	68.3	22.3	9.4	6,439,679	1,242,321	2,790,010	3,637,239	86.2	-180,132	394,015	213,883	275,208	2,416
	'88	5.5	72.2	22.4	8,503,778	67.7	19.3	13.0	7,108,662	1,395,116	2,816,478	3,509,655	77.7	-24,576	536,773	512,197	439,991	152,795
	'89	7.1	70.6	22.3	8,349,310	69.1	17.9	12.9	7,432,599	1,416,711	2,620,418	3,300,317	78.6	-363,511	454,947	91,435	282,342	21,34*
	'90	11.5	61.6	26.8	8,658,101	72.3	16.2	11.5	7,305,905	1,352,196	2,453,123	3,078,626	76.5	-461,082	456,958	-4,124	-50,680	-64*

*Ilegible

EXHIBIT 11

National Underwriter

PROFILES

1991

Property/Casualty Insurers

Financial And Underwriting Performance Results

National Underwriter

PROFILES

1991

Property/Casualty Insurers

Financial And Underwriting Performance Results

Successor To Argus Health Chart

David W. Doligalski, Editor

NATIONAL
UNDERWRITER
The National Underwriter Co./
505 Gest St./Cincinnati, OH 45203

UNITED SERVICES AUTOMOBILE ASSOCIATION, TX
USAA Group

Usaa Bldg
San Antonio, TX 78288
(512) 498-2211

Reciprocal Exchange. Organized 1922. Ratings: Demotech A; Moody's Ass.
Licensed in DC & All States; Also GU,PR,VI.

Year	Total Admitted Assets $000	Poli-cyholder Surplus $000	Change in Sur-plus %	Net Pre-mium Written $000	Change in NPW %	Net Income $000	NPW to Surplus *	Return on Sur-plus %	Pure Loss Ratio %	Loss Adj Expense Ratio %	Undwrtg Expense Ratio %	Com-bined Ratio %
1986	3,541,508	1,705,817	–	1,633,314	–	183,971	1.0	–	69.9	12.3	12.5	–
1987	4,090,069	1,893,274	11.0	1,895,950	16.1	321,357	1.0	18.8	62.6	11.3	11.8	100.7
1988	4,651,842	2,239,286	18.3	2,059,691	8.6	226,141	0.9	11.9	63.6	12.7	11.9	100.8
1989	5,306,308	2,652,673	18.5	2,197,098	6.7	211,884	0.8	9.5	66.7	14.3	11.8	103.1
1990	5,650,683	2,739,861	3.3	2,380,783	8.4	65,069	0.9	2.5	68.1	15.3	12.3	105.8

(Non-Investment Grade Bonds to Surplus: 4.3%; Real Estate to Surplus: 19.9%; Affil Investments to Surplus: 51.0%; AGent's Balances to Surplus: 11.8%)

1990 By-Line Experience	Direct Premium Written $000	Net Premium Written $000	Net Premium Earned $000	Pure Loss Ratio %
Auto Liability	987,625	1,010,350	989,646	75.8
Auto Physical Damage	736,761	753,295	742,247	58.2
Homeowners Multiple Peril	428,713	425,063	408,494	62.4
Fire and Allied	54,666	54,871	52,621	46.9
Other Liability (Non-Auto)	54,998	46,692	44,814	67.0
Inland Marine	42,838	42,392	40,402	47.7
Earthquake	20,924	20,759	18,115	71.5
Reinsurance	0	14,070	14,070	358.5
Ocean Marine, Aircraft	13,343	13,207	12,934	55.0
Workers' Compensation	70	70	69	5.3
Glass	14	14	14	0.0
Total All Lines	2,339,952	2,380,783	2,323,427	68.1

1990 By-State Experience (Top 20)	Direct Premium Written $000	Share of Total %	Direct Premium Earned $000	Pure Loss Ratio %
California	358,796	15.3	351,941	64.7
Texas	259,781	11.1	250,639	73.6
Florida	179,814	7.7	174,713	56.9
Virginia	158,765	6.8	154,532	61.8
New York	99,914	4.3	97,908	57.3
Georgia	85,235	3.6	83,722	58.0
Maryland	83,996	3.6	82,237	60.2
Pennsylvania	68,435	2.9	68,921	69.8
New Jersey	60,692	2.6	57,991	61.4
Washington	60,556	2.6	58,572	73.2
Colorado	60,061	2.6	58,696	95.9
North Carolina	53,091	2.3	51,521	62.9
Massachusetts	49,081	2.1	47,359	38.8
Connecticut	44,302	1.9	43,553	63.1
Arizona	44,134	1.9	42,591	63.7
Illinois	43,679	1.9	42,653	62.3
Ohio	40,821	1.7	39,909	57.8
Louisiana	40,352	1.7	39,265	68.7
Alabama	38,887	1.7	37,771	59.7
South Carolina	38,593	1.6	37,014	124.7

UNITED STATES FIDELITY & GUARANTY COMPANY, MD
US Fid & Gty Group

PO Box 1138
Baltimore, MD 21203
(301) 547-3000

Stock Company Incorporated 1896, Ratings: Moody's A1.
Lincensed in DC & All States: Also VI,CN.

Year	Total Admitted Assets $000	Policyholder Surplus $000	Change in Surplus %	Net Premium Written $000	Change in NPW %	Net Income $000	NPW to Surplus *	Return on Surplus %	Pure Loss Ratio %	Loss Adj Expense Ratio %	Undwrtg Expense Ratio %	Combined Ratio %
1986	7,025,483	1,239,905	–	3,562,035	–	187,639	2.9	–	70.3	10.2	28.4	–
1987	7,797,742	1,242,321	0.2	3,637,239	2.1	275,208	2.9	22.2	64.3	9.4	29.8	104.4
1988	8,503,778	1,395,116	12.3	3,509,655	-3.5	439,991	2.5	35.4	60.8	9.6	30.2	101.3
1989	8,849,310	1,416,711	1.5	3,300,317	-6.0	282,342	2.3	20.2	67.0	10.4	33.4	111.5
1990	8,658,101	1,352,196	-4.6	3,078,626	-6.7	-50,680	2.3	-3.6	69.4	12.3	34.1	116.3

(Non-Investment Grade Bonds to Surplus: 22.1%; Real Estate to Surplus: 48.1%; Affil Investments to Surplus: 44.1%; Agent's Balances to Surplus: 18.7%)

1990 By-Line Experience	Direct Premium Written $000	Net Premium Written $000	Net Premium Earned $000	Pure Loss Ratio %	1990 By-State Experience (Top 20)	Direct Premium Written $000	Share of Total %	Direct Premium Earned $000	Pure Loss Ratio %
Auto Liability	576,354	747,577	759,140	76.8	Massachusetts	222,933	9.1	234,168	85.1
Commercial Multiple Peril	516,512	694,916	718,155	53.4	Mississippi	143,726	5.9	152,176	63.9
Workers' Compensation	523,430	553,940	694,127	102.9	New York	128,580	5.2	134,308	76.2
Auto Physical Damage	236,377	341,738	355,783	49.4	Florida	111,447	4.5	126,412	65.0
Homeowners Multiple Peril	108,412	210,186	207,744	61.0	Pennsylvania	107,428	4.4	111,092	77.1
Other Liability (Non-Auto)	167,252	168,946	224,033	72.8	Texas	103,602	4.2	121,263	99.4
Fidelity, Surety, Fin Guar	115,455	113,800	114,622	19.6	Illinois	97,187	4.0	104,668	79.5
Fire and Allied	115,809	106,718	111,783	41.0	Virginia	90,758	3.7	100,036	73.8
Inland Marine	52,497	59,584	62,528	48.5	North Carolina	89,120	3.6	94,025	62.8
Reinsurance	0	33,403	32,926	104.8	California	88,394	3.6	107,332	41.9
Ocean Marine, Aircraft	24,840	19,096	26,129	58.7	Alabama	75,092	3.1	85,389	98.4
International	0	12,863	12,323	106.0	Indiana	74,193	3.0	77,031	55.6
Farmowners Multiple Peril	8,781	8,486	8,188	77.1	Tennessee	68,745	2.8	73,543	58.4
Earthquake	1,744	3,833	2,928	3.6	New Jersey	65,631	2.7	72,403	57.8
Burglary and Theft	1,457	1,580	1,703	11.7	South Carolina	64,629	2.6	66,232	58.5
Boiler and Machinery	3,544	1,334	1,174	60.9	Louisiana	61,953	2.5	65,943	56.0
Medical Malpractice	45	371	339	-61.7	Georgia	60,966	2.5	69,947	47.9
Glass	172	213	239	24.1	Oklahoma	60,317	2.5	66,988	69.4
Accident and Health	443	41	54	150.7	New Mexico	57,927	2.4	58,198	89.4
Total All Lines	2,453,123	3,078,626	3,333,919	69.5	Maryland	56,185	2.3	60,401	51.5

EXHIBIT JJ

CHRONOLOGY OF LITIGATION

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On OCT. 15 1991, I served the foregoing document described as:

ADDENDUM IN SUPPORT OF OPPOSITION TO MOTION TO DISMISS OR, IN THE ALTERNATIVE, FOR LEAVE TO AMEND AND REQUEST FOR SANCTIONS

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy

thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
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(213) 556-7900
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Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on OCT. 15 1991, at Claremont, California.

/s/ Jo-Ann Shimizu
JO-ANN SHIMIZU

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendants.	CASE NO. 91 3615 WFN REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR LACK OF SUBJECT MATTER JURISDICTION; OPPOSITION TO REQUEST FOR SANCTIONS Date: November 8, 1991 Time: 8:30 a.m. Room: To be assigned Trial Date: March 3, 1992

COMES NOW defendant UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") and submits its Reply Memorandum in Support of Motion to Dismiss Complaint for Lack of Subject Matter Jurisdiction; Opposition to Request for Sanctions as follows.

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I.

INTRODUCTION

USAA moved to dismiss this diversity action pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction. In the motion, USAA pointed out that, since it was

an unincorporated association with members in every state, the requisite complete diversity was lacking. In response, plaintiffs LAUGHLIN E. WATERS and VOULA D. WATERS argue that the Court nonetheless should exercise subject matter jurisdiction and, indeed, that USAA should be sanctioned for seeking dismissal. Plaintiffs' contentions are without merit. The case law, including a 1990 United States Supreme Court decision, makes it clear beyond question that USAA's status eliminates subject matter jurisdiction. Plaintiffs' sanctions request similarly has no basis; plaintiffs are improperly seeking to sanction USAA not for conduct in this case, but for conduct in other cases. Accordingly, USAA's motion to dismiss should be granted and plaintiffs' request for sanctions should be denied.

II.

FOR PURPOSES OF FEDERAL DIVERSITY JURISDICTION, USAA MUST BE CONSIDERED TO BE A CITIZEN OF EVERY STATE IN WHICH IT HAS MEMBERS

In opposing USAA's motion to dismiss, plaintiffs argue that both the law and the evidence concerning USAA's jurisdictional status are "in conflict" (Mem. 23-25). Plaintiffs are wrong.

First, the controlling legal principles are now clearly established. Both the Supreme Court and Ninth Circuit have expressly held that, for diversity purposes, the citizenship of an unincorporated association is measured by the citizenship of the association's members.

The Supreme Court explicitly made this point just last year in *Carden v. Arkoma Assocs.*, 494 U.S. 185, 110

S.Ct. 1015 (1990), a case plaintiffs do not even cite. *Carden* involved a diversity suit by an Arizona limited partnership with limited partners that were citizens of Louisiana, the same state of citizenship as the defendant. *Id.* at 1016. In determining the proper status of the limited partnership for diversity purposes, the Court noted that "[t]he fifty States have created, and will continue to create, a wide assortment of artificial entities." *Id.* at 1022. To evaluate such an entity's status, "[t]he precise question posed under the terms of the diversity statute is whether [it] may be considered a 'citizen' of the State under whose laws it was created." *Id.* at 1017.

After reviewing the case law, the *Carden* court found that while corporations have been considered citizens of the state of their incorporation since at least 1844, the court has "firmly resisted extending that treatment to other entities." *Carden,* 110 S.Ct. at 1018. Thus, the *Carden* Court held that "to determine, for diversity purposes, the citizenship of an artificial entity, the court [must] consult the citizenship of . . . all of the entity's members." *Id.* at 1021. The Arizona limited partnership involved in *Carden* accordingly was deemed to be a citizen of Louisiana as well as Arizona, and complete diversity therefore was lacking. *Id.* at 1022; *see also United Steelworkers of America AFL-CIO v. R.H. Bouligny, Inc.*, 382 U.S. 145, 149-153, 86 S.Ct. 272, 15 L.Ed.2d 217 (1965), (noting that "unincorporated associations" are treated as citizens of every state in which they have members); 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* (2d ed. 1984 & Supp. 1991) § 3630 (same).

Not surprisingly, the Ninth Circuit adopted the same jurisdictional analysis outlined in *Carden*. In *Rockwell*

Int'l. Credit Corp. v. United States Aircraft Ins. Group, 823 F.2d 302, 303-304 (9th Cir. 1987)[1], a "group of independent insurance companies" relied on diversity jurisdiction to remove a case to federal court. The Ninth Circuit raised the jurisdictional issue sua sponte and held that since the insurance companies were operating as "an unincorporated association," the case must be dismissed for lack of subject matter jurisdiction because "[a]ll members of an unincorporated association must be diverse from the opposing party." *Id.* at 304; *accord Faysound Ltd. v. United Coconut Chems., Inc.*, 878 F.2d 290, 292 (9th Cir. 1989) (citing *Rockwell*); *O'Halloran v. University of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988) (citing *Rockwell*); *Otero v. International Union of Elec. Radio & Mach. Workers*, 474 F.2d 3 (9th Cir. 1973) (per curiam) (citing *Bouligny*).

Second, the *Carden* jurisdictional analysis plainly requires that USAA's citizenship be measured by the citizenship of all of its members. Indeed, two courts of appeals have reached precisely this conclusion. Specifically, in *Tuck v. USAA*, 859 F.2d 842, 844-845 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989), the Tenth Circuit expressly examined USAA's citizenship for diversity purposes and decided that "USAA's status under Texas law" was that of an unincorporated association. The *Tuck* court therefore held that USAA was properly considered a citizen of every state in which it has members, and that, since some USAA members and the *Tuck* plaintiffs were citizens of the same state, the requisite complete diversity

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[1] *Rockwell* was subsequently overruled in other part on other grounds by *Partington v. Gedan*, 923 F.2d 686 (9th Cir. 1991) (per curiam).

was lacking.[2] Similarly, in *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974), the Second Circuit reviewed the Texas statutes "under which [USAA] was organized and exists," and concluded that it must "regard [USAA] as an unincorporated association." *Id.* at 395. Since, here again, USAA had members who were citizens of the same state as the plaintiff, the Second Circuit held that the action should be dismissed for lack of subject matter jurisdiction. While the Ninth Circuit has not had occasion to address the precise question of USAA's jurisdictional status, it is noteworthy that in *Rockwell*, the court expressly adopted *Baer's* statement of the general rule that "[a]ll members of an unincorporated association must be diverse from the opposing party." *Rockwell*, 823 F.2d at 304 (citing *Baer*, 503 F.2d at 395).

In the face of these authorities, plaintiffs offer (Mem. 23) only *USAA v. Glen Falls Ins. Co.*, 429 F.Supp. 101 (D. Conn. 1976), as evidence of the legal "conflict" they claim exists. But in *Glen Falls*, the court simply recited, without any jurisdictional analysis, that USAA "is a Texas corporation." *Id.* at 105. More fundamentally, *Glen Falls* predates *Carden* by fourteen years and, accordingly, plainly offers plaintiffs no support. Thus, plaintiffs have cited no real authority, let alone any post-*Carden* or post-*Tuck*

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[2] Plaintiffs complain (Mem. 3) that USAA's reliance on *Tuck* is "ironic" because USAA petitioned for a writ of certiorari to review the Tenth Circuit's decision; however, plaintiffs neglect to mention that in that petition, USAA did not challenge the Tenth Circuit's analysis of its jurisdictional status – an analysis which, after all, USAA had specifically urged the *Tuck* court to adopt.

authority, that creates any "conflict" as to USAA's jurisdictional status.

Plaintiffs also advance (Mem. 23-24) the notion that USAA functions as a "corporate creature" and thus should be considered a corporation for jurisdictional purposes. In making this "corporate creature" argument, plaintiffs point (Mem. 24) only to a 1939 decision of the California court of appeal, *Mitchell v. Pacific Greyhound Lines*, 33 Cal.App.2d 53, 91 P.2d 176 (1939), and to provisions of California's *Insurance Code*. These authorities, of course, say nothing about USAA's status under Texas law, nor do they even begin to refute the *Baer* and *Tuck* courts' analysis of that status. Moreover, these authorities have nothing to do with the issue of diversity jurisdiction. By their own terms, they merely establish that "a reciprocal exchange is to be treated as an entity" (*Mitchell*, 33 Cal.App.2d at 63-64) – a proposition that is legally irrelevant. As the Ninth Circuit held in *Fifty Assocs. v. Prudential Ins. Co.*, 446 F.2d 1187, 1190 (9th Cir. 1970), the fact that an unincorporated association is considered an entity under state law does not affect its jurisdictional status; "[t]he citizenship of each member" still must be analyzed. *Accord, Bouligny*, 382 U.S. at 149-150 (noting that "many voluntary associations . . . are indistinguishable from corporations" but affirming nonetheless the jurisdictional distinction between the two); *see also* 13B C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 3630 (2d ed. 1984 & Supp. 1991).

Finally, left without any genuine basis to oppose USAA's motion to dismiss in this case, plaintiffs devote the bulk of their memorandum to an attempt to manufacture authority by pointing to USAA's pleadings in other

cases (Mem. 5-22).[3] Specifically, in a small number of pre-*Carden* cases, counsel representing USAA made incorrect assertions about USAA's jurisdictional status, most typically describing USAA as a Texas corporation. As explained below, however, USAA has instituted strict controls to attempt to eliminate such errors in the future. But while these errors are regrettable, they have no impact on the issue of law now before this Court; the fact that USAA took erroneous positions in other cases provides no basis to ignore binding Supreme Court precedent by determining USAA's citizenship by reference to anything other than "the citizenship of 'all the members.' [Citations omitted.]" *Carden*, 110 S.Ct. at 1021. Here, it is uncontroverted that USAA has members who are domiciled in California. See Affidavit of Thomas J. Corridan (over 180,000 members in California). Since plaintiffs also are citizens of California, this action must be dismissed. *See Carden*, 110 S.Ct. at 1021; *Rockwell*, 823 F.2d at 304 (citing *Baer*, 503 F.2d at 395).

III.

PLAINTIFFS' ATTEMPT TO SEEK SANCTIONS IN THIS CASE FOR CONDUCT IN OTHER CASES IS UNFOUNDED

In addition to using USAA's pleadings in other cases to support an argument in favor of jurisdiction here,

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[3] Plaintiffs thus appear to be suggesting some sort of jurisdiction by estoppel. Any such suggestion, however, cannot be reconciled with "the traditional rule that the parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction." *Sullivan v. First Affiliated Securities, Inc.*, 813 F.2d 1368, 1374 (9th Cir. 1987), *cert. denied*, 484 U.S. 850 (1987).

plaintiffs claim that the actions in these other cases reflect a deliberate strategy by USAA to deceive the federal courts and thus serve as a basis to impose over $1 million in sanctions. Plaintiffs' position is utterly devoid of legal or factual support.

First, USAA's conduct in this case has been entirely proper. The complaint in this action was filed on July 5, 1991. Since *Carden* and *Tuck* had recently made it clear that USAA's jurisdictional status destroyed complete diversity and thus eliminated subject matter jurisdiction, USAA promptly responded with its motion to dismiss – the only pleading USAA has filed in this action – on July 29, 1991. As part of its submission, USAA provided the Court with a legal discussion of the most relevant authorities (*i.e., Tuck*) and an affidavit verifying its status as an unincorporated association with over 180,000 members in California. Thus, USAA has done precisely what the Tenth Circuit in *Tuck* instructed it to do: "[M]ake . . . motions [to dismiss] in all pending diversity litigation." *Tuck,* 859 F.2d at 845 n.3. By adhering to the legal standards announced by the Supreme Court in *Carden* and by following the express direction of the Tenth Circuit in *Tuck,* USAA obviously has not done anything here even arguably improper, let alone warranting Rule 11 sanctions.

Second, it is well established that actions in other cases cannot serve as a basis for sanctions in this case. The ABA's formal standards on Rule 11 expressly provide that "[a] court may not impose Rule 11 sanctions for transgressions which occurred before another court or in another action." ABA, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure* (1988)

121 F.R.D. 101, 111, ("Standards"). Indeed, the very treatise on which plaintiffs place heavy reliance (Mem. 26-27) recognizes that:

> "Rule 11 does not contemplate a district court's imposition of sanctions in one case for the violative signing of a pleading . . . in another case or before another court." G. Joseph, *Sanctions: The Federal Law of Litigation Abuse* (1989) § 5(d)(2)(c), at 71-72.

The Ninth Circuit has adopted this principle, reversing a district court's decision to sanction counsel for frivolous arguments made in state court papers that were "never filed . . . in the federal action." *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1185 (9th Cir. 1988); *accord Burull v. First Nat'l. Bank of Minneapolis*, 831 F.2d 788, 790 (8th Cir. 1987), *cert. denied*, 485 U.S. 961 (1988). Thus, plaintiffs' only possible claim – i.e., that USAA's actions in other cases warrants sanctions here – fails as a matter of law.

Third, plaintiffs' sanctions argument not only lacks any legal basis, it distorts the factual record. USAA's conduct in the other cases cited by plaintiffs did not then, and does not now, warrant sanctions. The compilation of cases presented by plaintiffs as evidence of USAA's alleged "strategy" to deceive the federal courts is derived entirely from the *Tuck* litigation in the Tenth Circuit. The *Tuck* court was presented with the identical list of cases that plaintiffs now offer to this Court. See Declaration of Patrick E. Carr In Support of Request for Sanctions and in Opposition to Motion to Dismiss of Defendant USAA, para. 3. Although plaintiffs apparently are in close contact with counsel for the plaintiffs in *Tuck* – having

obtained his declaration – they have neglected to inform the Court that USAA presented a special report to the Tenth Circuit addressing those prior cases. The report both explained the prior cases in which USAA regrettably appeared as an entity in federal diversity actions, and detailed the measures undertaken by USAA to insure that it will not be a party in federal court actions based on diversity jurisdiction. For the Court's information a copy of that report to the Tenth Circuit is attached as Exhibit "A" to the Declaration of Timothy B. Dyk.[4]

As the report notes, USAA's litigation docket of approximately 15,500 active cases is handled on a highly decentralized basis. Most litigation is conducted through regional offices in Sacramento, California; Colorado Springs, Colorado; Tampa, Florida; Norfolk, Virginia; Reston, Virginia; and Seattle, Washington. Each office has various personnel, ranging from in-house claims counsel to claims management personnel who are not attorneys, who supervise lawsuits handled by USAA's staff counsel and by USAA's approximately 3,200 outside counsel. Unfortunately, given this geographical and organizational spread of litigation responsibility and the large number of cases involved, USAA erroneously took the position in a relatively small number of cases that it could appropriately participate as a party in federal diversity actions.

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[4] After the report was filed, the Tenth Circuit granted a joint motion to dismiss the appeal in light or the parties' settlement, and remanded the case to the district court with instructions to "dismiss pending motions and proceedings as moot."

As the report details, USAA has gone to great lengths to ensure that the problems identified in *Tuck* will not recur. For example, in the short time since the *Carden* decision, USAA has: sent an internal memorandum to all senior claims attorneys, claims attorneys, supervisors of litigation, regional claims management, and casualty file handlers reminding them that "USAA should appear neither as a plaintiff nor defendant in federal court when diversity is the jurisdictional basis"; sent a memorandum from its General Counsel to all of its approximately 3,200 outside counsel advising them that "[u]nder no circumstances should any case involving USAA be commenced in, defended in, or removed to federal court on the basis of diversity jurisdiction"; added a special notice to its new case file forms specifying that "USAA, a reciprocal interinsurance exchange, as an entity, is not subject to federal diversity jurisdiction in any of the federal districts"; and finally, updated its internal docketing procedures and investigated available computer software to enable it to better track all pending court cases.

USAA believes that these steps, and the others identified in the report, will correct the problem reflected in the list of cases presented in *Tuck* by preventing USAA's future participation as a party in federal diversity actions. The absence of any new cases from the list submitted by plaintiffs, and indeed, the prompt and entirely proper manner in which USAA has moved to dismiss this case, suggest that these measures are working effectively.

IV.

CONCLUSION

For the foregoing reasons, USAA's motion to dismiss for lack of subject matter jurisdiction should be granted, and plaintiff's request for sanctions should be denied.

DATED: October 25, 1991

Respectfully submitted,

DANIELS, BARATTA & FINE

By Paul R. Fine
Paul R. Fine
Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is 1801 Century Park East, Ninth Floor, Los Angeles, California 90067.

On October 28, 1991, I served the foregoing document described as **REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS COMPLAINT FOR**

LACK OF SUBJECT MATTER JURISDICTION; OPPOSITION TO REQUEST FOR SANCTIONS on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

William M. Shernoff
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

I deposited such envelope(s) in the mail at Los Angeles California. The envelope was mailed with postage thereon fully prepaid.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on October 28, 1991, at Los Angeles, California.

/s/ Shirley Kadomoto
Shirley Kadomoto

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM F. NIELSEN,
DISTRICT JUDGE PRESIDING
(VISITING FROM THE
EASTERN DISTRICT OF WASHINGTON)

LAUGHLIN E. WATERS, ET AL.,	)	
PLAINTIFFS,	)	
VS.	)	NO. CV
UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	91-3615-WFN (GHKX)
DEFENDANT	)	

REPORTER'S DAILY TRANSCRIPT OF PROCEEDINGS

LOS ANGELES, CALIFORNIA

FRIDAY, NOVEMBER 8, 1991

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TRANSCRIPT OF PROCEEDINGS OF FRIDAY, NOVEMBER 8, 1991

HEARING: DEFENDANT'S MOTION TO DISMISS

[p. 4] LOS ANGELES + CALIFORNIA, FRIDAY, NOVEMBER 8, 1991

+ 8:30 A.M.

THE COURT: BE SEATED.

THE CLERK: CASE NUMBER CV 91-3615-WFN(GHKX), LAUGHLIN E. WATERS, ET. AL., VERSUS UNITED SERVICES AUTOMOBILE ASSOCIATION.

COUNSEL, PLEASE STATE YOUR APPEARANCES.

MR. FINE: PAUL FINE FOR DEFENDANT UNITED STATES (AS STATED) SERVICES AUTOMOBILE ASSOCIATION.

THE COURT: GOOD MORNING, MR. FINE.

MR. SHERNOFF: BILL SHERNOFF FOR PLAINTIFF WATERS.

MR. DARRAS: GOOD MORNING, YOUR HONOR. FRANK DARRAS, D A R R A S, FOR THE PLAINTIFFS, THE WATERS.

THE COURT: WE'RE HERE ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFFS' MOTION FOR SANCTIONS.

AND I WAS ASKED IF I HAVE A TENTATIVE RULING, AND I DON'T. IT'S NOT MY HABIT TO DO THAT. I HAVE SOME THOUGHTS THAT I'M WILLING TO SHARE OR SOME QUESTIONS I GUESS I HAVE IN MY MIND; BUT I'LL DO THAT MAYBE AS THE ARGUMENTS PROCEED.

I THINK, MR. FINE, YOU'D LIKE TO START.

MR. FINE: YES, YOUR HONOR, IF I MIGHT.

I WILL BE BRIEF AT THIS TIME, YOUR HONOR, BECAUSE I THINK THE MATTER IS RATHER SIMPLE AND STRAIGHTFOWARD [sic].

U.S.A.A. IS A RECIPROCAL INSURANCE COMPANY. THEIR STATUS OR THEIR RIGHT TO USE THE FEDERAL COURTS HAS BEEN [p. 5] DETERMINED ON TWO OCCASIONS BY THE 2ND CIRCUIT AND THE 10TH CIRCUIT. AND SUBSEQUENT TO THAT – I'M REFERRING NOW TO THE *BAER* AND THE *TUCK* DECISIONS, AND THOSE CASES INVOLVE U.S.A.A., THE SAME ENTITY THAT'S BEFORE YOUR HONOR TODAY.

THOSE CASES, I THINK, ARE DISPOSITIVE OF THE MOTION AND GIVE THIS COURT NO ALTERNATIVE BUT TO DISMISS. BUT IF THAT WERE NOT ENOUGH, THE UNITED STATES SUPREME COURT,

SUBSEQUENT TO THE *TUCK* AND *BAER* DECISIONS, HAS ISSUED ITS OPINION IN THE *CARDEN* CASE, AGAIN HOLDING THAT IN DIVERSITY ACTIONS THERE MUST BE COMPLETE DIVERSITY OF ALL PARTIES.

THE COURT: *CARDEN* INVOLVED A LIMITED PARTNERSHIP, DID IT NOT?

MR. FINE: IT DID, YOUR HONOR.

THE COURT: AND HERE WE HAVE AN UNINCORPORATED ASSOCIATION OF HUNDREDS OF THOUSANDS OF INDIVIDUALS.

MR. FINE: OVER 186,000 MEMBERS.

THE COURT: IN CALIFORNIA.

MR. FINE: IN CALIFORNIA ALONE, YOUR HONOR.

THE COURT: WOULD THERE BE A DISTINCTION BETWEEN *CARDEN* AND *TUCK* – LET ME ASK IT THIS WAY: COULD *TUCK* HAVE COME DOWN THE WAY IT DID POST-*CARDEN*? IN OTHER WORDS, COULD THEY HAVE MADE THAT A CLASS ACTION? COULD WE DO THAT IN THIS CASE, ELIMINATING THE NONDIVERSE MEMBERS OF THE ASSOCIATION?

MR. FINE: I DON'T THINK YOU CAN, YOUR HONOR. THAT HASN'T BEEN REQUESTED AND IT'S NOT REALLY BEFORE THE COURT AT [p. 6] THIS TIME, BUT U.S.A.A. –

THE COURT: WELL, THE COURT COULD GRANT LEAVE TO AMEND AND STRUCTURE AN

AMENDED COMPLAINT OF THE SAME FORM AND TYPE THAT THE DISTRICT COURT IN KENTUCKY DID ON THE ORDER OF THE 10TH CIRCUIT, COULD IT NOT?

MR. FINE: YOUR HONOR, IF YOU LOOK AT THE *TUCK* DECISION, THE 10TH CIRCUIT WAS VERY CAREFUL ABOUT WHAT THEY WERE SUGGESTING. I MEAN, THEY DID IN FACT MAKE THE SUGGESTION YOUR HONOR IS MAKING; BUT IN THE FOOTNOTES THEY EXPRESSLY STATED – NOT EVEN IN THE FOOTNOTES, IN THE BODY OF THE OPINION AS WELL, THEY STATED THAT THAT MODE OF DEALING WAS FRAUGHT WITH PERIL, AND THEY DIDN'T EVEN SAY AT THIS POINT THEY REACHED A CONCLUSION AS TO WHETHER OR NOT PLAINTIFFS COULD HAVE SURVIVED IN A CLASS ACTION FORM.

I THINK WHAT'S INTERESTING, BETWEEN *TUCK* AND THIS CASE ANYWAY, YOU KNOW, *TUCK* WENT TO A VERDICT; AND AFTER THAT WAS THE FIRST TIME THAT THE DIVERSITY ISSUE WAS RAISED.

THE COURT: DOES THAT REALLY MAKE A DIFFERENCE?

MR. FINE: I THINK IT SHOULD, YOUR HONOR, WHEN WE GET TO THE NEXT POINT, WHICH IS THE SANCTION ISSUE. I DON'T THINK IT MATTERS, NO, BECAUSE, I THINK JURISDICTION IS AN ISSUE FROM DAY 1, IT NEVER GOES AWAY, IT CAN NEVER BE WAIVED; AND NO MATTER WHAT IS DONE HERE, THE 9TH CIRCUIT MUST TAKE IT AND REMAND IT BACK DOWN.

THE COURT: YES. REALLY, MY QUESTION IS: I THINK I [p. 7] UNDERSTAND THE *CARDEN* CASE, WHICH OF COURSE IS WRITTEN BY JUSTICE SCALIA AND CAME DOWN IN 1990. BUT IT DOES INVOLVE A LIMITED PARTNERSHIP. I ASSUME THERE AREN'T VERY MANY LIMITED PARTNERS AND THERE'S ONE GENERAL.

MR. FINE: THAT IS CORRECT.

THE COURT: AND I UNDERSTAND THE RULING INDICATES THAT IN A CASE INVOLVING A LIMITED PARTNERSHIP, YOU HAVE TO INCLUDE ALL OF THE PARTNERS, LIMITED OR GENERAL.

AND MY QUESTION REALLY IS WHETHER OR NOT THERE'S A DISTINCTION BETWEEN THAT RULING AND A CASE SUCH AS *TUCK* AND THIS CASE, WHERE WE DON'T HAVE A LIMITED PARTNERSHIP; WE HAVE THIS UNINCORPORATED ASSOCIATION WITH THESE HUNDREDS OF THOUSANDS OF MEMBERS THAT COULD BE NAMED DEFENDANTS IN A CLASS ACTION SIMILAR TO THE *TUCK* CASE.

YOU CAN EITHER HAVE IT, AS I SEE IT, A CLASS ACTION NAMING AS DEFENDANTS ALL OF THE U.S.A.A. MEMBERS; AND, AS I UNDERSTAND IT UNDER RULE 23, YOU CAN IGNORE DIVERSITY THAT WAY AND JUST HAVE THE REPRESENTATIVE PARTY BEING THE NONRESIDENT, OR AS *TUCK* DID, EXCLUDE THOSE AS MEMBERS OF THE CLASS THAT ARE NONDIVERSE.

MR. FINE: I THINK THERE ARE PROHIBITIONS AGAINST DOING THAT IN THE FORM OF THE

INSURANCE CODE, WHICH DOES NOT ALLOW DIRECT ACTIONS AGAINST THE MEMBERS UNTIL AFTER THE ENTITY ITSELF HAS BEEN SUED. THAT'S JUST ONE HURDLE THAT'D HAVE TO BE FACED.

[p. 8] THE COURT: IS THAT UNDER CALIFORNIA LAW?

MR. FINE: YES, CALIFORNIA INSURANCE CODE. AND I BELIEVE THAT TEXAS IS SIMILAR, BUT I WON'T MAKE THAT REPRESENTATION TO THE COURT.

BUT I THINK THAT THE ANSWER TO YOUR QUESTION ABOUT *CARDEN*, IS ANSWERED AS FOLLOWS: *CARDEN* WAS A LIMITED PARTNERSHIP SITUATION, AND THE COURT SAID EVERYBODY HAS TO BE DIVERSE.

THE 9TH CIRCUIT RULED IN A CASE IN 1987, *ROCKWELL INTERNATIONAL CREDIT CORPORATION*, AND THAT WAS A LABOR UNION, THAT WHERE EVERY MEMBER WAS SITUATED HAD TO BE LOOKED AT IN TERMS OF DIVERSITY. SO THAT'S THE 9TH CIRCUIT. THAT'S CITED IN OUR PAPERS, AS WELL.

THE COURT: I'VE LOOKED AT IT.

MR. FINE: AND IF THE *CARDEN* CASE ISN'T ENOUGH, THE U.S. SUPREME COURT RULED IN *UNITED STATES STEEL WORKERS OF AMERICA, A.F.L.-C.I.O., VERSUS* – I'M NOT GOING TO PRONOUNCE THIS CORRECTLY – *BOULIGNY*, A 1965 DECISION, THAT UNINCORPORATED ASSOCIATIONS ARE TRUSTED AS CITIZENS IN EVERY STATE IN WHICH THEY HAVE MEMBERS.

AGAIN, IT SEEMS TO ME CONCLUSIVE THAT THAT'S EXACTLY WHAT WE HAVE HERE AND THAT THE COURT MUST DISMISS THIS CASE.

WITH RESPECT TO THE SANCTION ISSUE –

THE COURT: BEFORE WE LEAVE THAT, IN THE U.S. SUPREME COURT CASE OF *NEWMAN-GREEN* – THAT'S A 1989 CASE, I RECOGNIZE; [p. 9] IN OTHER WORDS, THE YEAR BEFORE *CARDEN*, BUT THAT CASE IN A FOOTNOTE SEEMS TO APPROVE THE PROCEDURE FOLLOWED BY *TUCK* WHEN IT REFERRED TO *JASSER* (PHONETIC) *VERSUS NEW YORK PROPERTY INSURANCE UNDERWRITING ASSOCIATION*, WHICH HANDLED THE MATTER JUST IN EXACTLY THE SAME WAY THAT *TUCK* DID. I DON'T THINK *CARDEN* MENTIONS THIS *NEWMAN-GREEN, INC.* –

MR. FINE: I DON'T THINK IT DOES.

THE COURT: – BUT BY INCLUDING IT, INCLUDING THE REFERENCE TO *JASSER* AS IT DID, IT'S ALMOST – WELL, TO ME IT INDICATES AN APPROVAL OF THE METHOD; AND I WONDER IF YOU HAVE ANY OBSERVATIONS ON T (ILLEGIBLE)

MR. FINE: YOUR HONOR, IF YOU WILL DEFER THAT TILL YOU HEAR FROM THE COUNSEL, I WILL RAISE THAT ISSUE. I HAVE SOME NOTES THAT I WILL REFER TO AND WILL ADDRESS FOR YOU.

THE COURT: ALL RIGHT.

MR. FINE: BUT I WOULD THIS FIRST TIME AROUND ALSO LIKE TO ADDRESS THE SANCTION ISSUE.

THE COURT: CERTAINLY.

MR. FINE: RULE 11 IS VERY SPECIFIC IN WHAT IT CALLS FOR. IT CALLS FOR COUNSEL WHO SIGNED THE DOCUMENT TO SIGN THAT DOCUMENT AFTER INVESTIGATING THE FACTS, INVESTIGATING THE LAW, AND SIGNING THE DOCUMENT SO AS NOT TO IMPOSE DELAY, ET CETERA, IN THE LITIGATION.

WHAT HAS BEEN DONE IN THIS CASE IS VERY STRAIGHTFORWARD. THE WATERS FILED THE COMPLAINT. PARAGRAPH 2 [p. 10] OF THEIR COMPLAINT ALLEGES THAT:

"DEFENDANT UNITED STATES SERVICES AUTOMOBILE ASSOCIATION IS AND AT ALL TIMES HEREIN MENTIONED WAS A DOMESTIC RECIPROCAL INSURANCE COMPANY WITH ITS PRINCIPAL PLACE OF BUSINESS IN THE STATE OF TEXAS."

I MIGHT ADD, BY THE WAY, THAT THAT'S NEVER – THAT'S NOT AN ISSUE IN THIS CASE. EVERYBODY, THE WATERS AGREE, U.S.A.A. AGREE: THEY ARE RECIPROCAL.

PARAGRAPH 3 OF PLAINTIFFS' COMPLAINT ATTEMPTS TO IMPOSE ORIGINAL JURISDICTION PURSUANT TO 28 U.S.C. 1332.

THE FIRST THING THAT U.S.A.A. DID IN THIS ACTION WAS TO FILE A MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION. THAT MOTION IS PRECISELY THE CONDUCT THAT THE *TUCK* COURT DIRECTED U.S.A.A. TO FOLLOW IN ALL LITIGATION. HOW, FOLLOWING THE 10TH CIRCUIT'S

DIRECTIVE IN A POST-*BAER*, POST-*TUCK*, POST-*CARDEN* SITUATION CAN VIOLATE RULE 11 IS BEYOND ME.

IT IS ALSO CLEAR, IN THE 9TH CIRCUIT, THAT SIGNING PLEADINGS OR PAPERS IN OTHER LITIGATION IS NOT TO BE USED IN TERMS OF IMPOSING SANCTIONS UNDER RULE 11 IN THIS LITIGATION.

THE COURT: SO IF U.S.A.A. DOES THINGS RIGHT IN THIS CASE, EVEN THOUGH THEY'VE TAKEN CONTRARY POSITIONS DOZENS OF TIMES IN, YOU MIGHT SAY, DISREGARD FOR ETHICS ACROSS THE COUNTRY IN THE FEDERAL SYSTEM, WE HAVE TO IGNORE THAT.

MR. FINE: I THINK UNDER RULE 11, YOU DO, YOUR HONOR. [p. 11] I'M NOT ADMITTING BY MY RESPONSE THAT THAT'S HAPPENED.

BUT I DO WANT TO POINT OUT TO THE COURT THAT THE OPPOSITION AND THE MOTION FOR SANCTIONS IN THIS CASE IS ESSENTIALLY THE EXACT MOTION THAT WAS MADE IN *TUCK*. AND *TUCK* WAS A CASE THAT HAD GONE THROUGH VERDICT BEFORE THE ISSUE OF SUBJECT MATTER JURISDICTION WAS RAISED.

CLEARLY, THE 10TH CIRCUIT OR THE TRIAL COURT IN *TUCK* HAD EVERY REASON TO BE UPSET WITH U.S.A.A. THAT'S NOT THE CASE HERE. AND AS THE REPORT THAT WE SUBMITTED, THAT WAS ALSO FILED IN THE 10TH CIRCUIT, SHOWS, U.S.A.A. HAS GONE TO GREAT EXTREMES, IF YOU WILL, TO

CLEAN UP THEIR ACT. IF THERE WAS ANY CRITICISM AS TO THEIR CONDUCT PRE-*TUCK*, POST-*TUCK* THEY'VE DONE A LOT TO REMEDY THE PROBLEMS.

AND IT IS, I THINK, INHERENTLY UNFAIR TO TELL U.S.A.A., WHEN THEY GET SUED IN THE FEDERAL COURT AND THEY SEEK TO FOLLOW THE 10TH CIRCUIT'S DIRECTIVE AND DISMISS, THAT THEY'RE ESSENTIALLY DAMNED IF THEY DO AND DAMNED IF THEY DON'T.

IF WE DIDN'T CHALLENGE THE COURT'S JURISDICTION AND WE WAITED AND A VERDICT CAME DOWN AND IT WAS APPEALED TO THE 9TH CIRCUIT AND THE 9TH CIRCUIT SUA SPONTE, AS WAS DONE IN *BAER*, REVIEWED THE ISSUE AND DETERMINED THAT THERE WAS NO DIVERSITY, NO SUBJECT MATTER JURISDICTION, AND THREW THE CASE OUT, MR. SHERNOFF WOULD BE YELLING AND SCREAMING APPROPRIATELY. BUT THAT ISN'T THE SITUATION HERE.

SO FOR THOSE REASONS, I THINK THAT SANCTIONS ARE AGAIN [p. 12] TOTALLY INAPPROPRIATE IN THIS CASE; AND I THINK FOR THE REASONS STATED, THE CASE MUST BE DISMISSED.

AND I WILL ADDRESS THE CLASS ACTION ISSUE IN A MINUTE.

THE COURT: THANK YOU, MR. FINE.

MR. SHERNOFF, PLEASE.

MR. SHERNOFF: THANK YOU. YOUR HONOR, FIRST I'M GOING TO ADDRESS THE JURISDICTIONAL ISSUE AND THEN MOVE ON TO THE SANCTIONS ISSUE.

I BELIEVE THAT THERE ARE TWO WAYS THAT THE COURT COULD HOLD FOR JURISDICTION OF THIS CASE. THE FIRST WAY IS – AND THIS IS SOMETHING THAT I THINK COUNSEL ESCAPES – IS THE FACT THAT A RECIPROCAL EXCHANGE, WHICH WE ALL AGREE THIS IS, IS A DIFFERENT ANIMAL THAN THE TRADITIONAL UNINCORPORATED ASSOCIATION.

AND THAT'S WHY WE DIDN'T CITE *CARDEN* OR ANY OTHER VOLUNTARY ASSOCIATION OR LIMITED PARTNERSHIP, BECAUSE A RECIPROCAL EXCHANGE, A RECIPROCAL INTERINSURANCE EXCHANGE, IS DIFFERENT. IT IS A CREATURE OF STATUTE.

AND I'D LIKE TO CITE TO THE COURT – I JUST WAS ABLE TO FIND THIS CASE RECENTLY. IT'S A STATE OF MISSOURI CASE, AND IT'S THE FIRST ONE THAT I'VE BEEN ABLE TO FIND WHICH ACTUALLY ANALYZES IN LENGTH: WHAT IS THIS ANIMAL CALLED RECIPROCAL INSURANCE EXCHANGE? AND THAT CASE IS *STATE OF MISSOURI EX REL. AUTO CLUB*, WHICH WAS ALSO A RECIPROCAL INSURANCE EXCHANGE; AND THAT'S FOUND AT 263 SOUTHWEST 2ND 68 (SIC). AND [p. 13] BASICALLY –

THE COURT: WHAT YEAR WAS THAT CITED, MR. SHERNOFF? IS THAT A RECENT CASE? I'M NOT

FAMILIAR WITH – THAT'S ALL RIGHT, IF YOU DON'T HAVE IT.

MR. SHERNOFF: 1982.

THAT COURT BASICALLY HELD THAT THE RECIPROCAL IN AN INSURANCE EXCHANGE IS RECOGNIZED AS A JURAL PERSON AND IS SUABLE AS AN ENTITY. IN OTHER WORDS, THEY WENT THROUGH THE WHOLE ANALYSIS OF THE RECIPROCAL EXCHANGE AND HOW IT'S FORMED AND WHY IT'S DIFFERENT. AND OF COURSE IT'S DIFFERENT, BECAUSE IT'S ALLOWED TO BE FORMED BY THE STATE STATUTE, AND THEY HAVE TO APPOINT AN ATTORNEY OF FACT TO BE SERVED FOR PROCESS.

AND I COULD ACTUALLY BURDEN THE RECORD HERE, BUT I DON'T WANT TO. I'M JUST GOING READ MAYBE A PASSAGE OR TWO FROM IT TO GIVE THE COURT A FLAVOR. BUT THIS DECISION SAYS:

> "ALTHOUGH AN EXCHANGE IS TECHNICALLY AN UNINCORPORATED ASSOCIATION, SIMPLY BECAUSE IT IS NOT A CORPORATION AS SUCH, THE STATUTES GOVERNING THE OPERATION OF THE EXCHANGE ARE RELATED – DEMONSTRATE THE LEGISLATIVE PURPOSE OF BOTH REQUIRING THE EXCHANGE TO BE A – TIGHTLY STRUCTURED IN A SPECIFIC MANNER."

AND THEY GO THROUGH THE WHOLE ANALYSIS OF WHY A RECIPROCAL EXCHANGE IS AN ENTITY AND SHOULD BE TREATED DIFFERENTLY THAN A GARDEN VARIETY ASSOCIATION.

[p. 14] AND THIS IS A POINT THAT MY WORTHY COUNSEL HERE MISSES. THIS IS WHAT THEY NEVER BROUGHT TO THE ATTENTION OF THE *TUCK* COURT. THEY NEVER TOLD THE *TUCK* COURT ABOUT WHY A RECIPROCAL EXCHANGE IS DIFFERENT; IT'S JUST NOT A GARDEN VARIETY VOLUNTARY ASSOCIAT. [sic]

NOW, THEY DID IN *PRIDGEN*, AS WE POINTED OUT IN OUR BRIEF, WHEN THEY WANTED TO BE IN FEDERAL COURT, WHEN THEY REMOVED FROM STATE COURT TO FEDERAL COURT. THEY WENT TO GREAT LENGTHS IN *PRIDGEN*. AND I THINK I'LL JUST REFER THE COURT TO PARTS OF OUR BRIEF.

THE COURT: YES. I READ THAT, BUT I DIDN'T GET THE SIGNIFICANCE OF IT. WHAT PAGE WAS *PRIDGEN* REFERENCED?

MR. SHERNOFF: *PRIDGEN* WAS ON PAGE 11 OF OUR BRIEF. IT WAS A GEORGIA C (illegible)

THEY REMOVED THAT CASE FROM STATE COURT TO FEDERAL COURT BECAUSE THEY WANTED TO BE IN FEDERAL COURT.

IN *PRIDGEN*, THEY WENT ON AND TOLD THE *PRIDGEN* COURT THAT UNDER TEXAS LAWS EXCHANGES ARE SIMILAR, IF NOT IDENTICAL, TO CORPORATIONS. THEY EVEN CITED THE TEXAS STATUTES, THEY CITED TEXAS CASES, AND THEY SAID BASICALLY THAT, "WE ARE A CORPORATION FOR DIVERSITY PURPOSES."

THEY WERE SO CONVINCING THAT THE FEDERAL COURT REMOVED IT, THE STATE AND FEDERAL COURT. AND THEY GOT THE ADVANTAGE OF THE FEDERAL COURT DECISION.

SO AS I HAVE INDICATED IN MY BRIEF – AND I DON'T WANT [p. 15] TO BELABOR THIS POINT – I BELIEVE, YOUR HONOR, FOR THE FIRST TIME, BECAUSE OF THE FACT THAT WE MAY HAVE ERRONEOUS CASES ON THE BOOKS – WE CERTAINLY HAVE LITIGANTS WHO HAVE BEEN DEPRIVED, OR FRAUDULENTLY DEPRIVED, I MIGHT ADD, OF THEIR RIGHTS – THAT THIS COURT FOR THE FIRST TIME SHOULD ENTERTAIN THE IDEA OF HOLDING AN EVIDENTIARY HEARING, AND LET'S HAVE SOME EVIDENCE ON JUST WHAT THIS RECIPROCAL EXCHANGE IS, FOR THE PURPOSES OF JURISDICTION; AND LET'S DECIDE THIS ISSUE INTELLIGENTLY AND ONCE AND FOR ALL AND STOP THIS CHARADE THAT'S BEEN GOING ON BY THESE PEOPLE IN THE FEDERAL COURTS.

AND THAT'S THE POINT COUNSEL MISSES. HE DOESN'T BRING THAT TO THE ATTENTION OF THIS COURT, AGAIN, IN HIS PAPERS. HE JUST CITES *TUCK* AND DISMISSES HIS CASE.

WHY DIDN'T HE CITE ALL THE AUTHORITY THEY CITED IN *PRIDGEN*? BECAUSE IT SUITED HIS PURPOSES NOT TO DO SO.

FURTHERMORE, AS THE COURT HAS POINTED OUT, APPROPRIATELY, THERE IS ANOTHER ALTERNATIVE METHOD – AND WE HAVE CITED THAT ALTERNATIVE METHOD IN OUR BRIEF ON PAGE 25;

AND WE HAVE CITED THE *NEWMAN-GREEN* CASE, AS WELL, ON PAGE 25 OF OUR BRIEF IN A FOOTNOTE – THAT THE FEDERAL RULES DO ALLOW FOR THE DISMISSAL OF THE NONDIVERSE PLAINTIFF.

THAT'S EXACTLY WHAT HAPPENED IN *TUCK*. IT WENT DOWN TO THE DISTRICT COURT. *TUCK* THEN PROCEEDED IN THAT FASHION. THEY SETTLED THE *TUCK* CASE AND PAID MONEY PURSUANT TO THAT FEDERAL [p. 16] JUDGMENT.

I DON'T KNOW HOW MR. FINE CAN GET UP HERE AND SAY THAT HE DOESN'T UNDERSTAND WHAT HAPPENED THERE. THEY SETTLED THAT CASE BASED UPON THE AMENDMENT THAT WAS ALLOWED AND THEN THEY FILED IN THE 10TH CIRCUIT THEIR REPORT BASED UPON THAT JURISDICTION.

THE SANCTIONS MOTION WAS IN FRONT OF THE *TUCK* COURT AT THE TIME THEY SETTLED, WHICH WAS VERY GOOD STRATEGY ON THEIR PART, SO THAT THE SANCTIONS MOTION WOULD NEVER BE HEARD.

THIS IS THE FIRST TIME THAT ANY COURT IS GOING TO DETERMINE WHAT SANCTIONS MAY BE APPROPRIATE FOR THEIR DISRESPECTFUL CONDUCT TO THIS COURT.

THE COURT: LET ME ASK YOU SOMETHING. I'M INTRIGUED BY WHAT HAPPENED IN *TUCK*; BUT *TUCK*, THAT WAS DONE IN 88 AND 89, I THINK, AND THEN *CARDEN* CAME OUT IN 90. AND THIS IS THE LANGUAGE THAT CONCERNS ME, MR. SHERNOFF,

IN *CARDEN*. IT'S ON PAGE 1021 OF THE SUPREME COURT REPORTER, WHERE SCALIA SAYS:

> "IN SUM, WE REJECT THE CONTENTION THAT TO DETERMINE FOR DIVERSITY PURPOSES THE CITIZENSHIP OF AN ARTIFICIAL ENTITY, THE COURT MAY CONSIDER THE CITIZENSHIP OF LESS THAN ALL THE ENTITY'S MEMBERS."

AND THEN IT GOES ON AND CITES THE CASES.

AND I WONDER IF THEY COULD HAVE DONE WHAT THEY DID IN *TUCK* HAD *CARDEN* BEEN ON THE BOOKS.

MR. SHERNOFF: I DON'T THINK THERE'S ANY QUESTION THAT [p. 17] THEY COULD. AS A MATTER OF FACT –

THE COURT: HOW WOULD THEY GET AROUND THIS?

MR. SHERNOFF: WELL, AS THIS MISSOURI CASE POINT [sic] OUT, BECAUSE THIS IS QUITE A TREATISE ON THIS SUBJECT, RULE 23.2 WAS AMENDED JUST FOR THAT PURPOSE: TO ALLOW FOR JURISDICTION FOR UNINCORPORATED ASSOCIATION.

ACCORDING TO THIS CASE – AND IT'S CITING THE HARVARD LAW REVIEW, 81 HARVARD LAW REVIEW 356 – RULE 23.2 WAS PROMULGATED TO PERMIT UNINCORPORATED ASSOCIATIONS TO CONTINUE TO UTILIZE THE CLASS ACTION PROCEDURE TO GET INTO FEDERAL COURT IN DIVERSITY CASES.

THE COURT: WELL, THEN, IF THAT'S THE CASE, YOU COULD HAVE A CLASS ACTION HERE AND NOT EVEN EXCLUDE FROM THE CLASS THOSE MEMBERS THAT LIVE IN CALIFORNIA –

MR. SHERNOFF: YES.

THE COURT: – JUST AS LONG AS YOU HAVE A REPRESENTATIVE OF THE CLASS WHO IS A NON-RESIDENT OF CALIFORNIA.

MR. SHERNOFF: THAT'S CORRECT, THE ATTORNEY OF FACT. AND THAT'S CERTAINLY ONE WAY TO GO.

I BELIEVE IN *TUCK* THEY WENT THE OTHER WAY. I THINK IN *TUCK* – BECAUSE I HAVE READ THE *TUCK* AMENDMENT AND I HAVE READ THE ORDER OF THE COURT IN *TUCK* PERMITTING THE AMENDMENT, WHICH I WOULD BE HAPPY TO SUPPLY TO THE COURT IF IT WISHES – I BELIEVE THAT IN THAT CASE THEY DID DISMISS THE DIVERSE SUBSCRIBERS.

[p. 18] THE COURT: THAT'S WHAT THE DISTRICT COURT OPINION IN THE FED. SUPP. INDICATED THEY DID DO.

MR. SHERNOFF: YES. SO I THINK IT COULD GO EITHER WAY; BUT MY PREFERENCE. YOU HONOR, IS THAT WE SHOULD DECIDE THIS CASE ONCE AND FIRST OF ALL. THIS IS IN [sic] IMPORTANT ISSUE –

THE COURT: YOU'RE RATHER INTRIGUED BY THE THEORY THAT THIS IS A RECIPROCAL INSURANCE EXCHANGE WHICH IS A SUABLE ENTITY AND DISTINCT IN CHARACTER AND LEGAL

NATURE FROM AN UNASSOCIATED – AN UNINCORPORATED ASSOCIATION?

MR. FINE: YES, YOUR HONOR. IT'S IMPORTANT ENOUGH, I FEEL, THAT THE ISSUE OUGHT TO BE AT LEAST HEARD, AT LEAST LIMITED EVIDENTIARY – I'D LIKE TO HAVE IT FULLY BRIEFED, BECAUSE THERE'S OTHER RECIPROCAL EXCHANGES AROUND: AUTO CLUBS, FARMERS INSURANCE EXCHANGE. I MEAN, THIS IS A RATHER IMPORTANT ISSUE FOR THESE COURTS.

AND IF YOU LOOK AT THE HISTORY OF WHAT THIS INSURANCE COMPANY DID TO THE FEDERAL COURTS OVER THE LAST FIVE YEARS AND THE JUDICIAL TIME THAT HAS BEEN SPENT, I WOULD THINK THAT: LET'S GET TO THE BOTTOM OF IT ONCE AND FOR ALL, RATHER THAN GOING TO THE ALTERNATIVE METHODS, WHICH WE CAN GO TO IF WE WANT (ILLEGIBLE)

THE COURT: WELL, AS A PRACTICAL MATTER, THOUGH, FROM YOUR STANDPOINT, IS IT WORTH SPENDING THE TIME AND EFFORT TO DO THAT IF THERE IS A QUICKER, SIMPLER, LESS EXPENSIVE WAY OF DOING IT IN THE FORM OF A CLASS ACTION?

[p. 19] MR. SHERNOFF: YES, YOU'RE CORRECT. IT IS SIMPLER AND IT'S QUICKER, AND I GUESS I'M THINKING MORE OF THE FUTURE. FOR PRECEDENT FOR OTHER CASES THAT MAY FOLLOW.

THERE'S A LOT OF CONFUSION HERE. I THINK WE SHOULD CLEAR UP THE CONFUSION AND SOME

COURT, UPON APPROPRIATE FINDINGS AND EVIDENCE, SHOULD DETERMINE WHETHER A RECIPROCAL INSURANCE EXCHANGE IS A CORPORATION FOR DIVERSITY PURPOSES.

THAT HAS NEVER BEEN DETERMINED SIMPLY BECAUSE – WE HAVE HOLDINGS TO THAT EFFECT IN *TUCK*, BUT *TUCK* NEVER DISCUSSED RECIPROCAL INSURANCE EXCHANGE.

THE COURT: I GATHER THAT GOING THIS ROUTE WOULD POTENTIALLY MEAN THAT THE *ROCKWELL CREDIT*, THE 9TH CIRCUIT CASE, WOULD NOT BE CONTROLLING –

MR. SHERNOFF: THAT'S CORRECT.

THE COURT: – BECAUSE THAT CLEARLY WAS NOT A RECIPROCAL INSURANCE EXCHANGE.

MR. SHERNOFF: THAT'S CORRECT. ANYTHING NOT A RECIPROCAL INSURANCE EXCHANGE IS NOT EVEN APPLICABLE, IN MY VIEW, SUCH AS *CARDEN* OR ANY OF THE OTHER CASES.

THERE ARE DIFFERENT RULES FOR VOLUNTARY UNINCORPORATED ASSOCIATIONS THAN – DISTINCT FROM RECIPROCAL INSURANCE EXCHANGES. THAT'S A CREATURE OF STATUS.

YOU CAN'T GO OUT, VOLUNTARILY CREATE A RECIPROCAL INSURANCE EXCHANGE, LIKE YOU CAN A LIMITED PARTNERSHIP OR VOLUNTARY ASSOCIATION. YOU CAN'T DO IT.

[p. 20] YOU HAVE TO FOLLOW THE STATUTE. YOU HAVE TO BE AN INSURANCE COMPANY. YOU

HAVE TO FOLLOW CERTAIN PRESCRIBED THINGS IN THE STATUTE.

THE COURT: AND I – EXCUSE ME, MR. SHERNOFF.

THEN, IN THIS CASE, DO WE HAVE TO LOOK TO TEXAS LAW TO DETERMINE WHAT U.S.A.A. REALLY IS?

MR. SHERNOFF: I BELIEVE SO.

THE COURT: OR CALIFORNIA LAW?

MR. SHERNOFF: I BELIEVE TEXAS LAW.

THE COURT: IN OTHER WORDS, EVEN THOUGH THIS IS A DIVERSITY CASE, WE LOOK TO THE STATE IN WHICH THIS U.S.A.A. WAS CREATED?

MR. SHERNOFF: YES, TEXAS LAW AND TEXAS STATUTES.

AND IF YOU DO, AS U.S.A.A. HAS POINTED OUT WHEN IT SUITED THEIR PURPOSES, YOU WILL FIND THE TEXAS STATUTES, YOU WILL FIND THE TEXAS APPELLATE COURT CASES, WHICH HOLD THAT THIS IS A – IT SHOULD BE TREATED AS A CORPORATION.

THE COURT: IF THAT'S THE CASE, THEN WHY COULDN'T WE JUST HAVE BRIEFING WITHOUT A HEARING?

MR. SHERNOFF: WE COULD. WE COULD. I THOUGHT A HEARING MIGHT BE APPROPRIATE TO DETERMINE WHETHER OR NOT PERHAPS EVIDENTIARY-WISE SOME TESTIMONY MIGHT BE IN ORDER

ABOUT THEIR CORPORATE STRUCTURE. THEY ARE A HOLDING COMPANY, TOO.

WHEN YOU HAVE A RECIPROCAL EXCHANGE, YOU HAVE SEVERAL COMPANIES. YOU USUALLY HAVE A MANAGEMENT COMPANY AND AN [p. 21] EXCHANGE. SOMETIMES THE MANAGEMENT COMPANY, WHICH IS THE PARENT COMPANY, IS INCORPORATED.

YOU GET INTO SOME COMPLEX SITUATIONS. AND ALL I REALLY WANTED TO DO IS PUT THE TRUTH IN FRONT OF THE COURT FOR ONCE AND FOR ALL.

THE COURT: WELL, I THINK YOU CAN TELL FROM MY QUESTIONS TO YOU THAT I AM CONCERNED ABOUT *CARDEN*, AND I THINK THAT THAT'S CONTROLLING. AND IF U.S.A.A. WERE NOT A RECIPROCAL INSURANCE EXCHANGE AND THEREFORE A SEPARATE ENTITY, BUT REALLY AN UNINCORPORATED ASSOCIATION, I THINK *CARDEN* CONTROLS AND THIS COURT WOULD NOT HAVE JURISDICTION.

I THINK TO GO AND USE YOUR FIRST ALTERNATIVE, FOR THIS COURT TO MAINTAIN JURISDICTION IT WOULD HAVE TO FIND THAT THE RECIPROCAL INSURANCE EXCHANGE IS A CREATURE THAT IS DISTINGUISHABLE FROM THE LANGUAGE OF *CARDEN*.

MR. SHERNOFF: AND I WOULD URGE, CERTAINLY, THIS COURT TO GO DOWN THAT PATH AND LET'S LOOK AT IT, BECAUSE I AM CONFIDENT, YOUR

HONOR, THAT ONCE YOU GET THE WHOLE OF IT AND THE FULL BRIEFING IN FRONT OF YOU ON THIS PRECISE QUESTION, THAT YOU WILL FIND THAT THERE IS JURISDICTION.

THERE'S ONLY A FEW COURTS THAT HAVE LOOKED AT IT, BUT EVERY COURT THAT HAS HAS SO FOUND.

AND QUITE FRANKLY, I CERTAINLY WELCOME THAT, AND I THINK IT'S IMPORTANT NOT ONLY FOR THIS CASE BUT OTHERS THAT MAY FOLLOW.

[p. 22] AND WITH THAT, I WOULD LIKE TO TURN TO THE SANCTIONS ISSUE, UNLESS YOU HAVE FURTHER QUESTIONS CONCERNING JURISDICTION.

THE COURT: AT SOME POINT IN TIME, I WANT TO ASK MR. FINE HIS RESPONSE TO YOUR SUGGESTION OF FURTHER BRIEFING ON THE ISSUE OF RECIPROCAL INSURANCE EXCHANGE, BUT YOU GO AHEAD ON THE SANCTIONS ISSUE.

MR. SHERNOFF: YOUR HONOR, ON THE SANCTIONS ISSUE, I FEEL VERY, VERY CONCERNED, TO SAY THE LEAST. I THINK YOU COULD TELL THAT FORM THE FLAVOR OF THE PAPERS THAT WE PUT FORTH.

MY FEELING IS THE INTEGRITY OF THE FEDERAL COURT AND THE FEDERAL COURT SYSTEM IS SOMEWHAT AT STAKE HERE. THIS IS THE FIRST TIME ANY COURT OR ANY JUDGE IS GOING TO ACTUALLY RULE ON WHETHER OR NOT CONDUCT SUCH AS THIS, MOST OF WHICH THEY ADMIT, SHALL BE

SANCTIONED OR SHALL BE APPROVED BY THE FEDERAL COURTS.

I THINK IT'S SHAMEFUL. HE SAYS THEY'VE CLEANED UP THEIR ACT SINCE *TUCK*. THAT'S NOT THE CASE, YOUR HONOR.

WE'VE POINTED OUT IN OUR BRIEF THREE CASES THAT WE HAVE FOUND SINCE *TUCK* WHERE THEY HAVE – TO THEIR ADVANTAGE, WENT AND SECURED MONEY BY FEDERAL COURT JURISDICTION.

THE FIRST ONE IS *BARGER*, WHICH WE HAVE POINTED OUT ON PAGE 6 IN OUR BRIEF. THE SECOND ONE WAS *EVANGELISTA*, WHERE THEY FILED – HERE THEY FILED IN FEDERAL COURT, AFTER THE *TUCK* DECISION, YOUR HONOR; FILED IN FEDERAL COURT.

[p. 23] THE COURT: ON A DIVERSITY JURISDICTION BASIS.

MR. SHERNOFF: YES. AND THE FIRST ONE, ALSO.

BUT THE WORST ONE IS THE ONE IN THE 9TH CIRCUIT, IN THIS CIRCUIT, WHICH WAS THE *H.I.G.* CASE, THE HAWAIIAN CASE, WHERE ALMOST FIVE MONTHS AFTER *TUCK* WAS FINAL, THEY SECURED A $300,000.00 JUDGMENT AND HAD A COMPANY PAY TO THEM $300,000.00 BASED UPON DIVERSITY, KNOWING FULL WELL WHAT *TUCK* SAID.

NOW, I JUST CAN'T IMAGINE CONDUCT THAT IS MORE DESERVING OF SOME TYPE OF SANCTION THAN THIS. I MEAN, SOME SIGNAL HAS TO BE SENT

OUT BY THIS COURT TO NOT ONLY LAWYERS, BUT MORE IMPORTANTLY, LITIGANTS, PARTIES, THAT YOU JUST CAN'T PLAY GAMES LIKE THIS WITH THE FEDERAL COURT SYSTEM.

FOR THIS COURT NOT TO TAKE ANY ACTION WOULD BE LIKE PUTTING A STAMP OF APPROVAL ON THIS TYPE OF CONDUCT, SIMPLY BECAUSE THEY FOUND A WAY TO AVOID THE SANCTION MOTION IN *TUCK* BY PAYING THE JUDGMENT THAT THEY SHOULD HAVE PAID YEARS BEFORE. THEY SCOOPED THAT ONE UNDER THE RUG.

THERE'S NO WAY THEY'RE GOING TO SCOOP THIS ONE UNDER THE RUG. WE DEFINITELY THINK THAT THIS CONDUCT HAS TO BE REVIEWED, AND WE THINK IT'S JUST A VERY SERIOUS MATTER.

THE COURT: WELL, I WAS SURPRISED, TO SAY THE LEAST, WHEN I READ THE LITANY OF EVENTS THAT HAVE OCCURRED INVOLVING U.S.A.A.; BUT I AM CONCERNED ABOUT THE AUTHORITY THAT ONE COURT HAS TO IMPOSE SANCTIONS ON A LITIGANT FOR CONDUCT IN OTHER FORUMS.

[p. 24] MR. SHERNOFF: WELL, I HAVE FOUND A CASE – WELL, I'VE GOT TWO COMMENTS ON THAT.

THERE IS *IN RE I T E L SECURITIES LITIGATION*, FOUND AT 791 FED. 2D 672 – IT'S A 9TH CIRCUIT CASE – WHERE THERE WERE SANCTIONS AWARDED IN THAT CASE AGAINST AN ATTORNEY, WHERE THE ATTORNEY ADMITTED THAT HE FILED OBJECTIONS

IN A CLASS ACTION SETTLEMENT PROCEEDING IN ORDER TO EXACT FEE CONCESSIONS IN A RELATED LAWSUIT PENDING IN ANOTHER COURT. SO I THINK THERE IS SOME AUTHORITY FOR THIS.

BUT, YOUR HONOR, I THINK I WOULD RATHER PREFACE MY ARGUMENT MORE ON THE INHERENT POWER OF THE COURT TO POLICE ITS OWN RULES. IF THE FEDERAL COURTS DON'T HAVE THE INHERENT POWER TO SANCTION AND POLICE THEIR OWN RULES AND CAN ALLOW CONDUCT LIKE THIS TO GO ON JUST BECAUSE IT ESCAPED NOTICE AND IS FINALLY BROUGHT TO THE ATTENTION OF THE COURT, IT DEFIES REASONING AND LOGIC THAT THE COURT WOULD NOT HAVE THE POWER FOR SOME TYPE OF SANCTION.

AND PERHAPS IF THE COURT IS GOING TO LOOK AT THIS OTHER ISSUE, IT MIGHT WANT TO RESERVE RULING ON THE SANCTIONS, AS WELL, TO ALLOW US TO PERHAPS ENTERTAIN IDEAS OF AN APPROPRIATE SANCTION, WHICH COULD EVEN BE SOMETHING –

THE COURT: THAT WAS A THOUGHT I HAD. I THINK THAT BEFORE THIS COURT CAN TAKE A STRONG POSITION OR A POSITION ONE WAY OR ANOTHER ON SANCTIONS, IT BETTER MAKE SURE IT'S GOT JURISDICTION.

[p. 25] MR. SHERNOFF: YES, BECAUSE THIS IS A SERIOUS MATTER. THIS CASE, NATURALLY, ON THE SANCTIONS ISSUE, IS GOING TO BE WATCHED. THERE'S NO QUESTION ABOUT IT. THE SIGNAL THAT GOES OUT FROM THIS CASE IS GOING TO TELL

LAWYERS AND LITIGANTS IN THE FUTURE FOR THE NEXT I-DON'T-KNOW-HOW-MANY YEARS HOW TO BEHAVE IN FEDERAL COURT.

I MEAN, WHAT HAPPENED HERE IS SHAMEFUL, YOUR HONOR; AND THERE'S NO WAY THAT THE FEDERAL COURT CAN ALLOW THIS TO HAPPEN AND STAND BY.

AND FOR A PARTY TO COME INTO COURT AND SAY, "WELL, YES, WE DID ALL THIS WRONG IN THE PAST; BUT NOW WE'RE FIRST BEING DISCOVERED IN THIS CASE AND YOU CAN'T PUNISH US FOR OUR PAST CONDUCT," I CAN'T BELIEVE ANYBODY'D BUY THAT ARGUMENT. THAT'S LIKE A BANK ROBBER COMING IN SAYING, "YES, I ROBBED THE BANK 17 TIMES IN THE PAST; BUT THIS IS A DIFFERENT CASE. YOU CAN'T PUNISH ME FOR THAT."

IT'S MORE SERIOUS THAN THAT. AS A MATTER OF FACT, I WOULD HAVE EXPECTED – AND I THINK THIS IS ANOTHER REASON TO TAKE THIS MORE SERIOUS, THIS SANCTION ISSUE: I WOULD HAVE EXPECTED U.S.A.A. TO COME IN FRONT OF THIS COURT WITH A MUCH DIFFERENT POSTURE. I WOULD HAVE EXPECTED THEM TO SAY, "JUDGE, WE HAVE COMMITTED SOME PRETTY BAD STUFF IN THE PAST; AND WE PROBABLY SHOULD BE PUNISHED FOR IT," AND EVEN, "WE'VE DONE SOME BAD STUFF SINCE *TUCK*, AND WE'RE REALLY TRYING TO CLEAN UP OUR ACT, AND WE SHOULD HAVE SOME APPROPRIATE SANCTIONS; AND, YES, [p. 26] THERE MAY BE JURISDICTION, AND THERE MAY BE JURISDICTION

BECAUSE A RECIPROCAL EXCHANGE IS DIFFERENT," AND TELL THE COURT WHAT THEY ARGUED IN *PRIDGEN* INSTEAD OF HIDING ALL THAT FROM THE COURT.

THEY KNOW BETTER, YOUR HONOR. THEY KNOW – I THINK THEY SHOULD KNOW THAT THEY'RE NOT GOING TO PULL THE WOOL OVER THIS COURT'S EYES.

BUT IF YOU LOOK AT THEIR REPLY BRIEF CAREFULLY, AND AS YOU LISTEN TO COUNSEL VERY MATTER-OF-FACTLY, AND, YOU KNOW, "LET'S JUST TREAT THIS AS A ROUTINE MATTER. DON'T GET EXCITED, JUDGE" – I'M EXCITED ABOUT THIS. IT OFFENDS ME.

IF I COMMITTED CONDUCT ONE TENTH AS BAD AS THEY DO, YOU WOULD TELL ME TO HAVE MY TOOTHBRUSH AND I'D BE GONE.

THE COURT: I'M CONCERNED ABOUT THE FACT THAT U.S.A.A. CAN ALL OF A SUDDEN GET RELIGION AND JUST SAY, "NOW WE'RE OKAY AND YOU CAN'T TOUCH US AGAIN"; AND, YOU KNOW, AS AN OFFICER OF THE COURT, I THINK WE ALL ARE CONCERNED ABOUT THIS; BUT I ALSO AM CONCERNED ABOUT WHAT THIS COURT HAS THE LEGAL AUTHORITY TO DO, FRANKLY.

MR. SHERNOFF: YES. AND I AGREE, AND THAT IS SOMETHING THAT I WOULD LIKE TO HAVE THE OPPORTUNITY, AND I KNOW THE COURT WOULD, TOO, TO LOOK INTO AT A LITTLE GREATER DEPTH, BECAUSE THIS WHOLE AREA OF THE

INHERENT POWER OF THE COURT TO SANCTION IS SOMETHING THAT, IF THE COURT WOULD PERMIT ME, I WOULD WELCOME THE OPPORTUNITY TO GET INTO THAT DEEPER BECAUSE [p. 27] OF THE SERIOUSNESS OF THE CHARGES IN THIS PARTICULAR CASE.

THE COURT: I APPRECIATE THAT.

I'M GOING TO HEAR FROM MR. FINE.

AND SPECIFICALLY, MR. FINE, I'M INTRIGUED BY THE POSSIBILITY THAT U.S.A.A. IS NOT JUST AN INCORPORATED ASSOCIATION, BUT MAY BE A RECIPROCAL INSURANCE EXCHANGE, WHICH IS A MEANINGFUL DISTINCTION FROM THE UNINCORPORATED.

MR. FINE: LET ME ADDRESS THOSE ISSUES, YOU HONOR. I THINK THEY'VE BEEN ADDRESSED BEFORE. AND BECAUSE OF THE COURT'S CONCERN, LET ME READ SOME OF THE OPINION FROM THE *BAER* DECISION WHICH IS A 1974 OPINION, PAGE 395.

THE COURT: 2ND CIRCUIT. I HAVE THAT, I THINK. LET ME GRAB IT HERE.

(PAUSE.) OH, MAYBE I DON'T HAVE *BAER*.

MR. FINE: IT'S A BRIEF SECTION, YOUR HONOR. IT READS:

> "THUS, UNDER THE TEXAS STATUTE, THE RECIPROCAL IS REGARDED AS DISTINCT FROM AN INSURANCE" – QUOTE – " 'STOCK COMPANY' " – UNQUOTE – "OR, IN

OTHER WORDS, FROM AN INSURANCE CORPORATION.

"AS WE SHALL SOON POINT OUT, THIS FORMAL DISTINCTION DRAWN BETWEEN THE INSURANCE RECIPROCAL AND THE INSURANCE CORPORATION UNDER STATE LAW SEEMS TO BE, UNDER *UNITED STEEL WORKERS VERSUS R. H. BOULIGNY, INC.*," – I'LL NOT READ THE CITE – [p. 28] "DISPOSITIVE ON THE ISSUE OF WHETHER THE RECIPROCAL SHOULD BE CONSIDERED A CORPORATION FOR DIVERSITY PURPOSES."

THE COURT: IS THAT A NEW YORK ORGANIZATION?

MR. FINE: U.S.A.A. IS THE SAME TEXAS –

THE COURT: OH, THAT'S RIGHT. THAT WAS U.S.A.A.

MR. FINE: YES.

"IRRESPECTIVE OF WHETHER THE DISTINCTION IS A PRACTICAL MATTER, AN ARTIFICIAL OR ILLOGICAL ONE, THE EXISTENCE OF THE DISTINCTION UNDER STATE LAW AND NOT THE LOGIC UNDERLYING THAT DISTINCTION IS THE PARAMOUNT CONSIDERATION. INASMUCH AS THE TEXAS STATUTE DRAWS THAT DISTINCTION, WE ARE CONSTRAINED HERE TO REGARD UNITED AS AN INCORPORATED ASSOCIATION.

"FOR THE PURPOSE OF DETERMINING WHETHER DIVERSITY JURISDICTION EXISTS, UNINCORPORATED ASSOCIATIONS HAVE LONG BEEN CONSIDERED TO BE CITIZENS

OF EACH AND EVERY STATE IN WHICH THE ASSOCIATION HAS MEMBERS."

I'LL END THE QUOTE THERE.

THE COURT: WHAT DOES TEXAS LAW SAYS [sic]?

MR. FINE: THAT IS THE ANALYSIS UNDER TEXAS LAW, YOUR HONOR. THE COURT IN *BAER* ANALYZED THE TEXAS STATUTES, WHICH BASICALLY ALLOWED FOR THE FORMATION OF THE RECIPROCAL NOW KNOWN AS U.S.A.A.

[p. 29] THE *BAER* DECISION WAS THEN CITED BY THE *TUCK* COURT, AT PAGE 845:

"THIS IS NOT THE FIRST TIME THAT U.S.A.A. HAS FACED THIS PROBLEM. IN *BAER VERSUS UNITED SERVICES AUTOMOBILE ASSOCIATION*, PLAINTIFF BAER APPEALED A JUDGMENT IN FAVOR OF U.S.A.A. TO THE 2ND CIRCUIT. THE COURT OF APPEALS RAISED THE QUESTION OF JURISDICTION SUA SPONTE AND AFTER CAREFUL EVALUATION OF U.S.A.A.'S STATUS UNDER TEXAS LAW DETERMINED THAT FOR DIVERSITY PURPOSES, U.S.A.A. WAS PROPERLY CONSIDERED A CITIZEN" – QUOTE – " 'OF EACH AND EVERY STATE IN WHICH IT HAS MEMBERS' " – END QUOTE.

"THE TUCKS OFFER NOTHING THAT PERSUADES US TO DEPART FROM THE HOLDING IN *BAER*. ACCORDINGLY, WE ARE FORCED TO CONCLUDE THAT AS THE CASE NOW STANDS, THERE IS NOT COMPLETE

DIVERSITY AMONG THE PARTS, AND SUBJECT MATTER JURISDICTION IS LACKING," END QUOTE.

I SUBMIT TO THIS COURT THAT THE WATERS OFFER NOTHING NEW, AS WELL.

BUT FOLLOWING *TUCK*, WE HAVE *CARDEN*; AND THE COURT WENT TO THE SECTION OF THE OPINION THAT I WOULD HAVE READ TO YOU NOW, THE SAME SECTION THAT I THINK CONTROLS YOUR DECISION IN THIS CASE.

YOU ASKED BEFORE ABOUT: WHAT DO YOU DO ABOUT FEDERAL RULE OF CIVIL PROCEDURE 23.2 IN A CLASS ACTION? THE HISTORY OF [p. 30] *TUCK*, AS MR. SHERNOFF POINTED OUT, IS THAT THE *TUCK* COURT ADOPTED A CLASS ACTION APPROACH. U.S.A.A. APPEALED THE DISSENT TO THE 10TH CIRCUIT, URGING THAT THIS APPROACH WAS NOT PERMISSIBLE. THE CASE SETTLED BEFORE THE 10TH CIRCUIT EVER DEALT WITH THAT.

THE GOVERNING PROVISIONS OF CLASS ACTIONS INDICATE THAT U.S.A.A IS NOT GIVEN LEGAL STATUS OR ENTITY TREATMENT UNDER APPLICABLE STATE LAW; AND THAT'S WHAT I REFERRED TO BEFORE, YOUR HONOR, WAS THE INSURANCE CODE SECTION. I BELIEVE IT'S 1450.

THE COURT: ARE YOU SAYING THAT *TUCK* SAID THAT IT COULD NOT GO FORWARD AS A CLASS ACTION?

MR. FINE: NO, THE TRIAL COURT IN *TUCK* –

THE COURT: THE TRIAL COURT IN *TUCK* DID GO FORWARD.

MR. FINE: – DID GO FORWARD. U.S.A.A. APPEALED TO THE 10TH CIRCUIT ON THAT ISSUE, AND THAT ISSUE WAS OF COURSE RESOLVED WITH THE SETTLEMENT.

THE COURT: WELL, NO. I THINK THE TRIAL COURT WENT FORWARD WITH THE CLASS ACTION AFTER THE 10TH CIRCUIT HAD RULED.

MR. FINE: YOUR HONOR, YOU MAY BE CORRECT. I WAS NOT THE COUNSEL ON THAT CASE.

THE COURT: WELL, THE *TUCK* DECISION FROM THE TRIAL COURT IS 1990, AND THE 10TH CIRCUIT *TUCK* IS 1988.

AND THE ORDER OF THE TRIAL COURT SAYS, IN ITS ORDER, THAT: THIS ACTION SHALL BE MAINTAINED AS A CLASS ACTION [p. 31] PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 23.2.

MR. FINE: I BELIEVE THERE WAS AN APPEAL OF THAT, THOUGH, YOUR HONOR.

THE COURT: WELL, I DON'T KNOW. I THINK THAT DISPOSED OF THE CASE.

MR. FINE: AGAIN, I WILL ACCEPT THAT. IT WAS MY UNDERSTANDING THERE WAS AN APPEAL OF THAT AND IT WAS SETTLED WHILE IT WAS ON APPEAL.

THE COURT: WELL, THAT COULD BE.

MR. FINE: I JUST WANTED TO POINT OUT THAT FEDERAL RULE OF CIVIL PROCEDURE 23.2, THE ADVISORY COMMITTEE NOTES, INDICATES THAT THE RULE IS INTENDED TO APPLY, QUOTE:

> "TO THE ASSOCIATION WHEN FOR FORMAL REASONS IT CANNOT SUE OR BE SUED AS A JURAL PERSON UNDER RULE 17(B)," END QUOTE.

RULE 17(B) PROVIDES THAT AN UNINCORPORATED ENTITY'S CAPACITY TO BE SUED IS DETERMINED BY THE LAW OF THE STATE IN WHICH DISTRICT COURT IS HELD.

CALIFORNIA LAW CONTROLS U.S.A.A.'S ENTITY STATUS HERE; AND AS THE WATERS POINT OUT – NOT U.S.A.A., THE WATERS POINT OUT – IN THEIR MEMORANDUM AND OPPOSITION TO THE MOTION TO DISMISS, AND THAT'S AT PAGE 24-25, CALIFORNIA LAW CONSIDERS A RECIPROCAL INSURER, SUCH AS U.S.A.A., TO BE AN ENTITY CAPABLE OF MAINTAINING SUIT IN ITS OWN RIGHT.

THE COURT: WELL, DO YOU THINK BECAUSE THIS IS A [p. 32] DIVERSITY CASE THAT CALIFORNIA LAW MUST BE LOOKED TO TO [SIC] DETERMINE THE NATURE OF THE DEFENDANT?

MR. FINE: NO, YOUR HONOR. BUT UNDER RULE 23, AS TO WHETHER OR NOT YOU CERTIFY THIS AS A CLASS ACTION, I THINK, YES, YOU HAVE TO LOOK TO CALIFORNIA LAW.

AS TO WHETHER OR NOT U.S.A.A. IS A RECIPROCAL FOR DIVERSITY PURPOSES, I THINK YOU HAVE

TO LOOK AT TEXAS LAW. AND I THINK THAT'S WHAT *BAER* DID, I THINK THAT'S WHAT *TUCK* DID, AND I THINK UNDER *BAER* AND *TUCK* AND THE *UNITED STATES STEEL WORKER* CASE UNDER THE 9TH CIRCUIT, THAT I REFERRED TO, AND THE *ROCKWELL INTERNATIONAL CREDIT CORPORATION VERSUS UNITED STATES AIRCRAFT INSURANCE CASE*, UNDER THE 9TH CIRCUIT —

THE COURT: BUT THOSE ARE ALL UNINSURED ASSOCIATIONS; AND I THINK I TEND TO AGREE THAT *CARDEN* AND *ROCKWELL* WOULD CONTROL, IF THAT'S WHAT U.S.A.A. REALLY IS.

MR. FINE: WELL, YOUR HONOR, THERE'S NO EVIDENCE TO THE CONTRARY.

THE WATERS ALLEGE THAT THEY'RE RECIPROCAL. U.S.A.A. ADMITS IT'S A RECIPROCAL AND FILES ITS AFFIDAVIT IN SUPPORT OF THAT FACT.

WE HAVE TWO COURT OF APPEAL DECISIONS WHO HAVE REVIEWED SPECIFICALLY WHETHER OR NOT U.S.A.A. AS A RECIPROCAL IS ENTITLED TO MAINTAIN AN ACTION IN THE FEDERAL COURT. BOTH THE 2ND AND THE 10TH CIRCUIT SAY NO.

SO I FIND THAT — I DON'T KNOW WHAT PURPOSE IS GOING [p. 33] TO BE SERVED BY HAVING AN EVIDENTIARY HEARING, AS MR. SHERNOFF SUGGESTS. AND IN TERMS OF BRIEFING, I THINK THAT WE HAVE BRIEFED, BOTH MR. SHERNOFF HAS AND WE HAVE BRIEFED THE MATTER SUFFICIENTLY FOR THIS COURT TO MAKE A DETERMINATION.

WE DID NOT CITE, I BELIEVE, YOUR HONOR, THE CASE OF *NORTHBROOK EXCESS AND SURPLUS INSURANCE COMPANY VERSUS MEDICAL MALPRACTICE JOINT UNDERWRITING ASSOCIATION OF MASSACHUSETTS*, WHICH IS FOUND AT 900 FED. 2D 476, THE 1ST CIRCUIT, 1990 DECISION.

THE COURT: SAY THE CITATION AGAIN, PLEASE.

MR. FINE: 900 FED. 2D 476. AND THAT WAS A DECLARATORY RELIEF ACTION BROUGHT BY AN INSURANCE COMPANY, WHICH IS NORTHBROOK, AGAINST AN UNINCORPORATED ASSOCIATION, THE UNDERWRITING ASSOCIATION. AND JURISDICTION WAS PREMISED ON DIVERSITY, THE DISTRICT COURT RULED IN THE PLAINTIFF'S FAVOR, BUT WHILE THE DECISION WAS ON APPEAL THE DEFENDANT CHALLENGED THE DISTRICT COURT'S SUBJECT MATTER JURISDICTION BY POINTING TO ITS JUDICIAL STATUS AND THE FACT THAT ONE OF ITS MEMBERS WAS A CITIZEN OF THE SAME STATE AS THE PLAINTIFF.

THE PLAINTIFF SOUGHT TO AMEND THE COMPLAINT, TO RESTYLE THE CASE AS A CLASS ACTION. THE 1ST CIRCUIT REMANDED FOR THE DISTRICT COURT TO CONSIDER THE JURISDICTIONAL ISSUE. THE DISTRICT COURT CONCLUDED THAT RULE 23.2 DID NOT ALLOW A CLASS ACTION TO BE BROUGHT AGAINST AN ENTITY THAT HAD JURAL STATUS UNDER STATE LAW AND THEREFORE DISMISSED FOR LACK OF [p. 34] SUBJECT MATTER JURISDICTION.

I DON'T KNOW OF ANY 9TH CIRCUIT CASE TO REACH A SIMILAR CONCLUSION, YOUR HONOR; BUT I THINK THAT THAT CASE IS DISPOSITIVE OF THE 23.2 ISSUE THAT YOU RAISED IN TERMS OF CLASS ACTION.

DO YOU HAVE ANY OTHER QUESTIONS?

THE COURT: NO, I DON'T MR. FINE. THANK YOU.

MR. FINE: WITH RESPECT TO SANCTIONS, IF THAT'S STILL AN ISSUE BEFORE THIS COURT, I'D LIKE TO RESPOND TO MR. SHERNOFF.

THE COURT: AS TO THE JURISDICTION ISSUE, I'M INTERESTED IN THE CONCEPT THAT THE RECIPROCAL INSURANCE EXCHANGE MAY RESULT IN A SUABLE ENTITY THAT IS DISTINCTLY DIFFERENT THAN THE INCORPORATED ASSOCIATION THAT WE FIND REFERRED TO IN SOME OF THE CASES. AND I'M GOING TO ACCEPT MR. SHERNOFF'S OFFER TO FURTHER BRIEF THAT SUBJECT, NOT SET UP AN EVIDENTIARY HEARING AT THIS TIME, BUT RESERVE THE POSSIBILITY OF HAVING AN EVIDENTIARY HEARING.

BUT I'D LIKE TO KNOW WHETHER OR NOT THERE IS ESTABLISHED CASE LAW, PARTICULARLY OUT OF TEXAS, BECAUSE I THINK WE ALL AGREE THAT WE HAVE TO LOOK TO TEXAS TO DETERMINE REALLY WHAT THIS U.S.A.A. IS.

AND LURKING, OF COURSE, IN THE BACKGROUND IS THE SANCTION ISSUE AND THE INHERENT POWER OF THE COURT. I THINK THAT WE OUGHT TO ADDRESS ONE AT A TIME, HOWEVER.

[p. 35] I'M INTERESTED MORE IN THE JURISDICTIONAL ISSUE AND I'M INCLINED TO RESERVE, UNLESS YOU WANT TO COME FORWARD WITH THE BRIEFING AT THIS TIME ON THE SANCTION ISSUE. BUT IF YOU DON'T, WE CAN CERTAINLY HANDLE THAT LATER, MR. SHERNOFF.

MR. SHERNOFF: WELL, YOUR HONOR, THE WAY I FEEL ABOUT THE SANCTIONS ISSUE IS, I KNOW I'M AN ADVOCATE, BUT THAT ISSUE GOES MORE TO THE COURT, REALLY, ABOUT HOW THE COURT FEELS ABOUT THE IMPORTANCE OF ITS OWN — THE CONDUCT AND POLICING OF ITS OWN RULES.

I'M CERTAINLY WILLING TO BRIEF IT NOW OR LATER. I THINK IT MIGHT, FOR EFFICIENCY PURPOSES, BE BETTER IF WE BRIEFED IT AT THE SAME TIME, SO THAT WE DON'T HAVE A DOUBLE BRIEFING SCHEDULE.

THE COURT: WELL, THAT'S FINE. ASSUMING WE DO THAT, THEN BRIEF BOTH THOSE ISSUES. AND AS A FALL-BACK POSITION, OF COURSE, YOU MAY WANT TO ALSO INCLUDE IN YOUR BRIEF YOUR NUMBER 2 OPTION, AND THAT IS THE CLASS ACTION, AMENDING YOUR PLEADINGS TO TRY TO CREATE A CLASS ACTION WHICH WOULD RETAIN JURISDICTION IN THIS COURT. SO MAYBE ALL THREE OF THOSE WANT TO BE TOUCHED.

HOW MUCH TIME DO YOU WANT?

MR. SHERNOFF: WELL, I WOULD LIKE PROBABLY TWO WEEKS, TWO OR THREE WEEKS.

THE COURT: I WAS THINKING MAYBE 30 DAYS. CAN YOU DO IT IN THAT SHORT A TIME?

MR. SHERNOFF: 30 DAYS IS FINE.

[p. 36] THE COURT: 30 DAYS.

HOW MUCH TIME DO YOU WANT TO RESPOND, MR. FINE?

MR. FINE: I WOULD LIKE AN EQUAL AMOUNT OF TIME, YOUR HONOR; BUT IF THE COURT HAS IMPOSED A TRIAL DATE OF MARCH 2ND ON THE PARTIES, AND WE WOULD HAVE TO GET ON WITH DISCOVERY AND SPEND A LOT [sic] MONEY IN THIS JURISDICTION OR PUT OFF THE TRIAL DATE, THEN I'D LIKE A SIMILAR AMOUNT OF TIME TO RESPOND.

THE COURT: WELL, I'LL GIVE YOU 20 DAYS TO RESPOND; AND WE'RE GOING TO HOLD THE TRIAL DATE, AT LEAST AT THIS STAGE; AND HOW YOU WANT TO PROCEED FOR PRETRIAL IS UP TO COUNSEL.

BUT WE HAVE A TRIAL DATE — I THINK IT'S MARCH 2ND. IS THAT WHAT YOU SAID? IT [sic] THINK THAT SOUNDS RIGHT.

MR. FINE: I BELIEVE THAT'S THE DATE THE COURT IMPOSED.

MR. SHERNOFF: ARE THERE ANY REPLY PAPERS APPROPRIATE TO THE RESPONSE?

THE COURT: WOULD YOU LIKE TO REPLY? WHAT WOULD YOU LIKE: 10 DAYS?

MR. SHERNOFF: 10 DAYS.

THE COURT: AND ALL THAT STARTS FROM TODAY. IS THAT SATISFACTORY?

MR. SHERNOFF: YES, SIR.

THE COURT: ANYTHING FURTHER, THEN?

MR. SHERNOFF: NOTHING FURTHER.

MR. FINE: YOUR HONOR?

[p. 37] MR. SHERNOFF: OH, YES. I DID WANT TO CORRECT A CITATION I GAVE YOU IN THAT MISSOURI CASE, YOU HONOR. THE MISSOURI CASE IS —

THE COURT: YOU SAID 263 SOUTHWEST 2ND 68.

MR. SHERNOFF: IT'S 49 ACTUALLY: SOUTHWEST 2ND 49. IT'S 636 SOUTHWEST 2ND 49, *AUTO CLUB VERSUS*, G A E T N E R, *GAETNER*.

THE COURT: SO 636 SOUTHWEST 2ND AT PAGE 49.

MR. SHERNOFF: YES.

THE COURT: 1982.

MR. SHERNOFF: YES.

THE COURT: THANK YOU, MR. SHERNOFF. MR. FINE. ANYTHING FURTHER?

MR. FINE: YES, YOUR HONOR. ARE WE GOING TO SCHEDULE A FURTHER HEARING ON THIS MATTER OR ARE YOU GOING TO TAKE IT UNDER SUBMISSION?

THE COURT: WELL, LET'S SUBMIT THE BRIEFS, AND I MAY CALL FOR A HEARING. I WANT TO LEAVE THAT OPEN.

AND IF WE HAVE TO HAVE AN EVIDENTIARY HEARING, IF WE DETERMINE THAT THAT'S APPROPRIATE, THAT, OF COURSE, MAY HAVE AN INFLUENCE ON THE TRIAL DATE, KEEPING THE TRIAL DATE. THAT'S ONE REASON I'M RELUCTANT TO SCHEDULE IT, BECAUSE I CAN UNDERSTAND THAT WE DO HAVE A TRIAL DATE THAT'S NOT TOO FAR DOWN THE LINE; AND FOR THE INTERESTS OF THE PARTIES, I THINK I'D LIKE TO TRY TO MAINTAIN THAT IF IT'S REALISTIC.

[p. 38] SO WE'LL RESERVE RULING ON ANY CHANGING OF THE TRIAL DATE; BUT THAT'S NOT REALLY BEFORE THE COURT RIGHT NOW, ANYWAY. WE'LL MAINTAIN THAT TRIAL DATE.

IF THERE'S NOTHING FURTHER, WE'LL ADJOURN.

MR. FINE: THANK YOU, YOUR HONOR.

MR. SHERNOFF: THANK YOU, YOUR HONOR.

THE COURT: PLEASE RISE. THIS COURT IS IN RECESS.

(PROCEEDINGS ADJOURNED.)

I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

/s/ Susan A Lee
SUSAN A. LEE,
CSR 2800, CM,
RPROFFICIAL COURT
REPORTER

DATED:
November 8, 1991

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS, Plaintiffs, -vs- UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	THIS CONSTITUTES NOTICE OF ENTRY AS REQUIRED BY FRCP, RULE 77(d). NO. CV-91-3615-WFN ORDER (Filed Nov. 21, 1991)

Before the Court is defendant's Motion to Dismiss and plaintiffs' Cross-Motion for Sanctions, heard on November 8, 1991 before the Honorable Wm. Fremming Nielsen, sitting by designation. Appearing for defendant was Paul Fine, and appearing for plaintiffs were William Shernoff and Frank Darras. As the Court requires further briefing on the issue of the nature of a reciprocal insurance exchange. Availability of class action and the inherent power of the Court to impose sanctions for conduct not directly involved by related to this action, the Court **RESERVES** ruling on the Motions.

Plaintiffs initiated this action to recover amounts allegedly due in excess of that offered by defendant under a home insurance policy. Defendant asserts summary judgment is merited in the absence of subject matter jurisdiction, because of lack of diversity. Defendant claims that it is an unincorporated association and therefore its citizenship is that of all members, including the over 180,000 California members. Plaintiffs counter that defendant as a statutorily created reciprocal insurance

exchange is subject to jurisdiction similar to that exercised over corporations. Plaintiffs in the alternative seek permission to amend their complaint to allow them to proceed as a class action. Plaintiffs finally assert that defendant's past conduct, asserting status as a corporate entity in some actions and as a non-corporate entity in others, merits sanctions being imposed.

The Court has read *Cardon v. Arkoma Assocs.*, 494 U.S. 185 (1990) and believes that the subject matter jurisdiction based on diversity would be absent if defendant is found to be an unincorporated association. Defendant cites *Baer v. U.S.A.A.*, 503 F.2d 393 (2nd Cir. 1974) and *Tuck v. U.S.A.A.*, 859 F.2d 842 (10th Cir. 1988), *cert. den.*, 489 U.S. 1080 (1989) for the proposition that it is an unincorporated association. However, plaintiffs assert that defendant as a reciprocal insurance exchange is not subject to the same rules to which an unincorporated association is subject. If plaintiffs are correct, *Cardon* would not be controlling. The Court requires further briefing on this issue.

If *Cardon* does control, there is authority that suggests that plaintiffs could still amend the complaint to bring this suite under Federal Rules of Civil Procedure 23.2, Class Actions. Further briefing is also required on this issue.

The Court is finally concerned with defendant's varying posture on whether it is an unincorporated association. Clearly, in this case, defendant only assumes that posture of an unincorporated association, but the varying stances can only be seen by comparing cases not before this Court. Does the inherent power of the court permit

this Court to impose sanctions upon defendant recognizing a flagrant pattern of abuse of the federal court system when this case is only one facet of the overall picture? Further briefing is required. Accordingly,

IT IS ORDERED, ADJUDGED AND DECREED that the parties submit briefing on issues of the nature of the reciprocal insurance exchange as an entity, ability to proceed under Federal Rules of Civil Procedure 23.2 and the inherent power of the court to sanction for activities outside the bounds of the case at bar. Plaintiffs shall **file their brief no later than December 9, 1981**; defendant shall **respond no later than December 30, 1991**; and plaintiffs shall **reply no later than January 8, 1992**. The Court further **ORDERS** that no further hearing will be necessary unless so ordered by this Court.

The Clerk is hereby **DIRECTED** to enter this Order and forward copies to counsel.

DATED this 19 day of November, 1991.

/s/ Wm. F. Nielsen
Wm. Fremming Nielsen
United States District Judge
Presiding by Designation

91-1707 (4)

No. _____

Supreme Court, U.S.
FILED
APR 23 1992
OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1991

IN RE
UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner

Petition For Writ Of Mandamus, Prohibition Or Other Appropriate Remedy To The United States District Court Central District of California

Petition For Writ Of Mandamus
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April 1992

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 WFN PLAINTIFFS' SUPPLEMENTAL BRIEFING AS ORDERED BY COURT IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF REQUEST FOR SANCTIONS (Judge Wm. Fremming Nielsen)

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Plaintiffs LAUGHLIN E. WATERS and VOULA D. WATERS hereby submit their supplemental Points and

Authorities as ordered by the Court in opposition to the Motion to Dismiss of defendant UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") and in support of plaintiffs' request for sanctions.

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1.

THIS COURT SHOULD AWARD SANCTIONS UNDER ITS INHERENT POWER TO PUNISH USAA FOR ITS ABUSE OF THE JUDICIAL PROCESS

A federal court has several sources of power for imposition of sanctions on a party. First, the court may award sanctions under FRCP 11 which provides that all papers submitted must be signed, attesting to the fact that the paper is well grounded in fact, is warranted by existing law and that it is not interposed for an improper purpose. Violation of that rule permits the court to impose sanctions against the party or its counsel and the sanctions may *include* the opposing party's reasonable attorney's fees and costs incurred as the result of the filing.

Second, a federal court may impose sanctions under 28 U.S.C. section 1927 against an attorney for the excess costs, expenses and attorney's fees reasonably incurred by the other party as the result of conduct which unreasonably or vexatiously multiplies the proceedings in any case.

Finally, the federal court has the inherent power to impose sanctions on a party. In *Roadway Exp., Inc. v. Piper,* 447 U.S. 752, 766, 100 S.Ct. 2455, 2464, 65 L.Ed.2d 488 (1980), the United States Supreme Court quoted its earlier decision in *Alyeska Pipeline Co. v. Wilderness Society,* 421 U.S. 240, 257, 95 S.Ct. 1612, 1621, 44 L.Ed.2d 141 (1975) and noted that federal courts have the inherent power to punish for the willful disobedience of a court order or when the party has acted in bad faith, vexatiously, wantonly or for oppressive reasons.

Under its inherent power, the court may impose sanctions which may include payment of the other party's attorney's fees (*Roadway, supra*) or, even more critically, *reimbursement to the court or government for costs incurred due to the party's bad faith conduct. Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985). Additionally, the court may impose the sanctions against the client on the theory that the client is responsible for the conduct of the attorney's litigation. *Cannon v. Loyola Univ. of Chicago*, 784 F.2d 777, 782 (7th Cir. 1986). Given USAA's use of various attorneys throughout the country, it is obvious that USAA was the "brains" behind the manipulation of the federal courts and should properly be personally exposed to the payment of sanctions.

A. Sanctions against USAA are properly awardable under this Court's inherent power.

An exhaustive examination of the court's inherent power to sanction is presented in *Eash v. Riggins Trucking Inc.*, 757 F.2d 557 (3rd Cir. 1985). In *Eash*, an attorney was sanctioned in the amount necessary to pay the government's costs in impanelling a jury for one day for his alleged misconduct in failing to settle an action prior to the day of trial. Although the plaintiff had made several attempts to settle the case, no settlement was reached until the day of trial and the trial court apparently believed that the settlement was achieved at that point only because the defense attorney had a scheduling conflict.

The attorney appealed the sanction award and the appellate court remanded in order that the attorney be

given notice and opportunity to be heard in regard to the sanction matter. However, in doing so, the *Eash* court overruled its prior decision in *Gamble v. Pope and Talbot, Inc.*, 307 F.2d 729 (3rd Cir. 1962) which precluded such an award of sanctions under the inherent power, in part because of the extensive criticism the decision had garnered from other courts and treatise writers. The *Eash* court noted:

> A major factor in the decisions that have refused to follow *Gamble* has been the startling increase in the number and complexity of cases filed in the federal courts. The dramatic rise in litigation in the last decade has led trial judges to conclude that indulgent toleration of lawyers' misconduct is simply a luxury the federal court system no longer can afford. See *Renfrew, supra*, 67 Calif.L.Rev. at 275-276. Chief Justice Burger has recently observed that "a small handful [of lawyers] must not be permitted to abuse the system and preempt its time and machinery for purposes not intended, thus delaying and denying" access to courts to others in need of the courts' limited resources.

The *Eash* court relied on the Supreme Court's decisions in both *Roadway* and *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) for the existence of the court's inherent power to sanction. As quoted from *Link, supra*, 370 U.S. at 630-631, 82 S.Ct. at 1388-1389, the *Eash* court noted:

> the "inherent power" to sanction an attorney was "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly

> and expeditious disposition of cases." *Eash, supra*, 757 F.2d at 567.

Similarly, in *Roadway*, the Supreme Court permitted taxing of attorney fees directly against an opposing attorney emphasizing "the well acknowledged inherent power of a court to levy a reasonable sanction in response to abusive litigation practices." *Eash, supra*, 757 F.2d at 568.

The standards for application of sanctions under the court's inherent power were stated by the court in *In Re Itel Securities Litigation*, 791 F.2d 672 (9th Cir. 1986.) There, the court noted that:

> [t]he imposition of sanctions under the inherent power of the court is proper where counsel has " 'willfull[y] abuse[d] judicial process' or otherwise conducted litigation in bad faith." . . . For purposes of imposing sanctions under the inherent power of the court, a finding of bad faith "does not require that the legal and factual basis for the action prove totally frivolous; where a litigant is substantially motivated by vindictiveness, obduracy, or *mala fides*, the assertion of a colorable claim will not bar the assessment of attorney's fees. *Itel*, 791 F.2d at 675.

In *Itel*, the attorney for a group of bondholders making claims against Itel intervened in the securities litigation as a plan of extortion in order to obtain fee concessions in the bondholders' separate action, which had already been resolved. The trial court imposed sanctions of $10,000 in favor of the class plaintiffs and $5000 in favor of Itel. The appellate court affirmed and found that, as noted above, the attorney's conduct in the present action was improper, based on the fact that his relief was properly obtainable in the other action. The court further

held that, again as noted in the quote above, the fact that his intervention in the securities litigation may not have been meritless did not preclude the finding of bad faith.

In the present case, even if USAA's contention that it is an unincorporated association has some merit, its failure to disclose to this court its past representations that it was a corporate or corporate-like entity for purposes of diversity jurisdiction displays its bad faith conduct. The court in *In Re Ronco, Inc.*, 838 F.2d 212 (7th Cir. 1988) made clear that the failure to make a full and complete disclosure to the Court is a proper basis for imposition of sanctions.

In *Ronco*, counsel for a bankrupt was appointed to represent the Creditors' Committee and opposed a motion to determine the validity of certain creditor's liens. That counsel appealed the bankruptcy court's decision to the district court, claiming that its recent appointment as special counsel to the Committee had left it too little time to properly oppose the motion. The district court affirmed the bankruptcy court's determination and imposed sanctions, in part because the counsel failed to disclose certain information: Counsel did not disclose that it had previously represented a single unsecured creditor in the bankruptcy prior to its representation of the Creditors' Committee and that it had worked on the creditor's lien motion prior to being appointed as special counsel. The *Ronco* court noted:

> While the appellant did not misstate an empirical fact, it did omit facts that were highly relevant to an accurate characterization of the facts that were stated. Such an obvious omission

> placed a heavy burden on a court. The presentation amounts, in its totality, to a half-truth that can be just as misleading, sometimes more misleading, than an absolutely false representation. For purposes of determining whether sanctions are appropriate, it is not relevant that later submission by the appellees brought the truth to light. . . . The impact on the court and on the opposing party occurs when the initial omission is made. Later correction does not permit a recoupment of the time, energy or, in some cases, money that has already been expended. *Ronco, supra*, 838 F.2d at 218.

Just as the appellants in *Ronco* did, USAA provided this Court with a half-truth, an omission of critical facts, when it filed its motion to dismiss. USAA argued, in wide-eyed innocence, that it was an unincorporated association and not subject to diversity jurisdiction in this case, while hiding from the court the fact that it had, numerous times in the past, itself invoked such diversity jurisdiction and had actually argued, convincingly, that it was a corporate-creature under Texas law and thus properly before the federal judiciary.

This also addresses USAA's contention that its conduct in other cases cannot be used as a basis for sanctions in this case. USAA claims that because it properly asserted its unincorporated status in this case, it committed no sanctionable wrong. That contention rings hollow. USAA's error was in failing to provide this Court with the full exposition on the diversity question. Its error was in seeking to pretend that there was no authority of any other determination, despite the fact that USAA itself had

successfully argued that there was properly federal jurisdiction in another case. (See USAA's brief in *Pridgin v. USAA*, attached as Exhibit A.)

On the same grounds, this disposes of USAA's assertion that a sanction award in this case places it on the horns of a dilemma. It claims that, under the 10th Circuit's order in *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), it is required to withdraw from any federal case. If it does not do so, USAA contends, it is in violation of that court's order[1], but if it does do so, USAA contends, it may be subject to sanctions. WATERS does not contend that USAA must never bring a motion to dismiss when a federal case is filed against it. Rather, in filing such a motion, the issue should be presented, with a full disclosure of the situation and the conflicting rulings so that each individual court can examine the matter for purposes of its own jurisdictional determination.

More importantly, the cumulative misconduct present in this case is a factor which cannot be left unconsidered. USAA did not merely make its misrepresentation to one court and then mend its ways. It engaged in a deliberate manipulation of jurisdictional rules to suit its

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[1] Interestingly, it is only now, when USAA wants out of this federal court, that USAA is so concerned with not violating the 10th Circuit's admonition. USAA seemed unconcerned with violating the 10th Circuit's order when it continued to maintain its federal suit against the Hawaiian Insurance and Guaranty Co., Ltd. and lined its pocket with a $350,000 judgment in that case well over a year after the *Tuck* court's opinion was issued. (See Declaration and letter of Bill Souza, attached as Exhibit B.)

own purposes and needs. The government and the parties adverse to USAA each suffered losses due to that misconduct. That cumulative misconduct has not been brought home to USAA's doorstep. If USAA is permitted to escape liability for that conduct, what incentive is there for others to refrain from playing exactly the same jurisdictional game?

As noted by the Ninth Circuit in *Matter of Yagman*, 796 F.2d 1165, 1182:

> As judges, we are particularly sensitive to the problem of, and widespread concern over, frivolous litigation and the abusive practices of some attorneys. "These practices tend to impose unjustified burdens on other parties, frustrate those who seek to vindicate their rights in the courts, obstruct the judicial process, and bring the civil justice system into disrepute."

Additionally, the fact that the other cases cited in plaintiffs' opposing paper are suggested as the basis for assessment of damages is not improper. In *Yagman*, a police officer accused of causing the death of a jail prisoner sued the forensic pathologists involved in the case for defamation. The court held that the action was meritless and granted a directed verdict in favor of defendants. In addition, the trial court imposed $250,000 in sanctions against the plaintiff's attorney under FRCP 11 and 28 U.S.C. section 1927.[2] The appellate court noted that the

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[2] The fact that this was a Rule 11 case highlights how broadly the courts will reach to sanction abusive conduct. Although the language of Rule 11 and section 1927 narrowly circumscribe the circumstances under which sanctions may be

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trial judge's imposition of sanctions was for the trial counsel's cumulative conduct throughout the case. The appellate court expressed the concern that such a cumulative sanction at the *end* of the case defeated one of the primary purposes of sanctions: To deter future wrongful conduct. But the court also noted that:

> In some situations, liability under proper sanctioning authority will not be immediately apparent or may not be precisely and accurately discernible until a later time. For example, findings under Rule 11 occasionally cannot be made until after the evidentiary portion of the trial. A claim may appear to raise legitimate and genuine issues before trial, even in the face of summary judgment challenges, but will be unmasked as not well-founded in fact after the claimant has presented his evidence. And, in some cases, not until after the defendant's case-in-chief. The court must be able to respond to these situations with appropriate sanctions in the hope of deterring future inadequate filings by the certifying attorney and the trial bar in general. *Yagman, supra,* 796 F.2d at 1183.

That observation is particularly apt in this case. USAA's scheming could not have been immediately apparent to any of the other courts in which USAA practiced its manipulation. Rather, it was not until the

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awarded under those provisions, the courts still apply those provisions broadly in order to achieve the necessary salutory effect. Given that Rule 11 and section 1927 may be so broadly applied, it is certainly proper to give that same broad application to the court's inherent power.

cumulative effect could be discerned that USAA's conduct could be uncovered and addressed. As the *Yagman* court noted, the "court must be able to respond to these situations with appropriate sanctions in the hope of deterring future inadequate filings" by others. If USAA is permitted to escape unscathed in this case, as it did in the other 172 cases already documented, there will be no deterrent effect on USAA or on any other litigants from engaging in a similar practice. Indeed, if USAA is permitted to escape unscathed, it could encourage other exchanges, other associations and other attorneys and litigants to play the same game. However, if substantial sanctions are imposed on USAA, the news will spread through the legal community and, in future, other attorneys and litigants will take heed and take care that when they make jurisdictional allegations, those allegations are accurate and not misleading.

The existence of the other cases cited in plaintiffs' opposing papers not only provide evidence of USAA's wrongful conduct in this case, and so are relevant for consideration, their mere existence provides a proper factor in determining sanctions. In both *Freeze v. Griffith*, 849 F.2d 172 (5th Cir. 1988) and *Moody v. Miller*, 864 F.2d 1178 (5th Cir. 1989), the courts imposed sanctions on prisoners bringing civil rights violation cases against their wardens, noting that sanctions were proper given the numerous meritless cases previously brought by those same prisoners.

As noted by the Ninth Circuit is a Rule 11 case:

> If a court finds that a motion or paper, other than a complain, is filed in the context of *a*

> *persistent pattern of clearly abusive litigation activity*, it will be deemed to have been filed for an improper purpose and sanctionable. *Aetna Life Ins. Co. v. Alla Med. Serv. Co.*, 855 F.2d 1470, 1476 (9th Cir. 1988). (Emphasis added.)

USAA's chameleon-like character gave it an advantage over other litigants and over individual federal courts. Since objective evidence exists to prove that USAA has made use of this advantage, this Court need only ask if it will allow itself and other federal courts to be used as a vehicle for the frustration of meritorious claims. The "persistent pattern of clearly abusive litigation activity" evidenced by the Addendum is continuing in this case. Although USAA's motion to dismiss is not frivolous on its face, it was filed for the improper purpose of continuing the pattern of fraud USAA has so actively engaged in.

B. Although this case presents an unusual circumstance for imposition of sanctions, that fact should not permit USAA to escape the consequences of its jurisdictional scheming.

There is no dispute that this case presents a unique situation. That fact, however, should not preclude this Court's exercise of its power to punish for improper conduct. As noted by the *Yagman* court:

> Each case must be taken individually and evaluated in light of its own peculiar circumstances. If sanctions are warranted by those circumstances, the court should not waiver in imposing them. *Yagman, supra*, 796 F.2d at 1182.

If USAA is permitted to escape all punishment in this situation, the door will be open to others to conduct the same type of jurisdictional manipulation without fear of reprisal, even assuming it is ever discovered. Such conduct must be stopped and stopped now. As one court observed:

> Mounting federal caseloads and growing public dissatisfaction with the costs and delays of litigation have made it imperative that the federal courts impose sanctions on persons and firms that abuse their right of access to these courts. *Dreis & Krump, Inc. v. Intern. Ass'n of Machinists,* 802 F.2d 247, 255 (7th Cir. 1986).

USAA has repeatedly abused its right of access to the federal court system. Its conduct should not be swept under a rug and permitted to go unpunished or unchastised. An award of substantial sanctions is the only appropriate means for deterring this conduct by USAA or others.

C. The amount of sanctions should properly be based on the number of cases in which USAA exercised its jurisdictional game-playing.

Finally, the amount of sanctions to be awarded is a critical issue. As noted in the *Eash* case, the sanction award may properly include reimbursement to the government for the expenses it incurred as a result of a party's improper and bad faith conduct. Obviously, it would be a task of mind-boggling proportions to go back and examine every case and attempt to assess the precise amount of time, money and effort which was expended and wasted by each court when required to deal with

USAA's jurisdictional ploys. Suffice it to say that the judicial time wasted is of major proportions. Here we are not only talking about pleadings and motions, but entire trials that were unnecessary if USAA had not engaged in its nefarious conduct. It is fair to say that there were certainly between 50 and 100 cases where substantial judicial time was wasted. That does not even count the litigants' time and the attorneys' time that USAA required to be spent due to its wrongful conduct. Finally, there have been appeals that would not have been necessary and possibly decisions made which were based upon erroneous, misleading or incomplete information.

Indeed, this is a novel and unique situation. There has never before been disclosed such a widespread waste of judicial resources. As noted by one respected law professor who specializes in legal ethics in discussing this case, "[USAA] has manipulated its status so that no rule applies to it." (Stephen Gillers, as quoted in the *Los Angeles Times*, November 8, 1991, Metro Section, page B4, copy attached as Exhibit C.) Additionally, Jeffrey S. Brand, a federal litigation specialist and law professor at the University of San Francisco noted that this is the sort of situation that has prompted calls for reform of the nation's civil justice system and "conduct like this should be of great concern to everyone because it makes it impossible" for the legal system to function properly. (*Ibid.*)

The sanctions must be severe to get the proper message across. This is not an isolated event. This was a cold and calculated course of conduct over years which has just now been discovered and the wrongdoer is now simply being brought to account.

Due to the fact that the Government has suffered from the wasting of judicial resources at the hands of USAA, it is only proper that this Court consider awarding a portion of the sanctions to be paid to the U.S. Treasury. Naturally, the Waters should receive a portion of the sanctions award for their efforts in bringing the wrongdoer to account.

It is undoubtedly safe to assume that the proposed $10,000 per case figure (for a total of $1.7 million) would be a minimal amount expended by the judiciary and the Government as a result of USAA's misdeeds.[3] Plaintiff suggests that an award of sanctions be split between the U.S. Treasury and Plaintiff, or on some other formula basis so that the sanctions award makes sense both from a deterrence point of view and from the point of view of reimbursing the Government for the judicial time wasted over the past years. Although this is a unique and novel approach for the awarding of sanctions, this is in fact a unique and novel case. The integrity of the judicial process is at stake, and must be preserved. The Federal Courts must let parties know that those who attempt to tinker with the integrity of the judicial process on such a wide-scale basis, will find that the cost by way of sanctions will be high if their scheme is discovered. No other remedy make sense.

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[3] For example, in *Tuck* alone, the case went all the way through trial and judgment, was appealed once, USAA sought writ of certiorari to the United States Supreme Court, it was remanded back to the trial court for amendment of the complaint, the order on that amendment was appealed and the action settled only during the pendency of the *second* appeal.

Here, USAA does not disavow its conduct. It happened and it's a matter of record. They offer no apologies. Their only defense is that the Federal Court system has no power to punish them for their years of misconduct because it was only recently discovered. If that excuse succeeds, it will be a sad day for the judiciary.

D. Even if it is ultimately determined that this Court has no subject matter jurisdiction, it may still impose sanctions.

Even if it were ultimately determined by this honorable Court that subject matter jurisdiction does not exist, and cannot be conferred through amendment, this Court still has the power to levy sanctions. For example, in *Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447, 2455, ___ L.Ed.2d ___ (1990), the Supreme Court held that a district court could impose Rule 11 sanctions even after the plaintiff had dismissed the action. Similarly, in *Eash, supra*, 757 F.2d at 559-560, the court upheld the district court's power to impose sanctions even 11 days after dismissal of the case.

This is only logical. If a party attempts to abuse the federal jurisdictional process and then invokes the lack of subject matter jurisdiction in order to escape a sanction award for that conduct, the federal judiciary will be powerless to prevent exactly the abuses perpetrated by USAA. Thus, even if this action is dismissed, this honorable Court should exercise its inherent power to punish USAA for its conduct.

2.

UNDER TEXAS STATUTORY PROVISIONS, A RECIPROCAL INTERINSURANCE EXCHANGE SUCH AS USAA IS DEEMED TO BE A CORPORATION AND THE CORPORATION CITIZENSHIP RULES THUS APPLY TO THE JURISDICTIONAL DETERMINATION

Since the 1987 amendment to the Texas corporation statutes, it has been clear that, under Texas law, a reciprocal interinsurance exchange such as USAA is a corporation. Article 1302-1.03 of the Texas Miscellaneous Corporation Laws Act provides that the Texas Business Corporation Act shall govern all domestic corporations organized under any statute of the State. Tex. Rev. Civ. Stat. Ann. art. 1302-1.03 (Vernon Supp. 1991); *see also* Tex. Bus. Corp. Act, art. 9.14 (Vernon Supp. 1991) (making Act applicable to any domestic corporation organized under any state statute). As stated in Article 1302-7.06(A)(2) of the Texas Miscellaneous Corporation Laws Act:

> 'Corporation' means: (a) Any corporation, ***association,*** or other organization incorporated or ***organized*** under . . . ***the insurance Code*** . . .

Thus, under explicit Texas statutes, a reciprocal interinsurance exchange organized under Chapter 19 of the Texas Insurance Code, which USAA admits to being, is deemed to be a corporation under Texas law.

Carden v. Arkoma Associates, 494 U.S. 185, 110 S.Ct. 1015 (1990), relied on by USAA to argue that, as an unincorporated association, it is not subject to diversity jurisdiction in this case, decided only the very narrow question of whether the citizenship of only the general partners or both the general and limited partners in a

limited partnership are to be considered for determination of federal diversity jurisdiction. This Court is not dealing with a limited partnership and to that extent, the holding in *Carden* has no relevance. Beyond that, however, dicta in *Carden* actually supports the WATERS' position in this motion.

The dicta in *Carden* stands for the proposition that federal courts should not look beyond the issue of whether an entity is, or is not, a corporation under state law for purposes of the diversity determination. If a business entity has been organized under state law, and is defined under state law, as a corporation, then a corporation it is for diversity purposes. If it is not a corporation, *Carden* says the rules regarding association citizenship apply.

Texas deems reciprocal interinsurance exchanges to be corporations. For diversity purposes, federal courts are required, under *Carden* to follow this designation and treat a reciprocal exchange as a corporation – that is, a citizen of its state of organization and the state in which it locates its principal place of business. USAA, organized under the Texas Insurance Code and having its principal place of business in San Antonio, Texas, is a citizen of the state of Texas; therefore, there is complete diversity between the Waters and USAA.

In response to the Waters suit, USAA has cited *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974), which reads Texas Insurance Code Chapter 19 as treating reciprocal or interinsurance exchanges as unincorporated associations. USAA also cites *Tuck v. USAA*, 859 F.2d 842, 845 (10th Cir. 1988), where the Tenth Circuit felt constrained to simply

follow *Baer*'s holding that USAA was an unincorporated association, without any further analysis. However, the *Baer* court considered only a few sections of Chapter 19; nor did it look to Texas case law interpreting the chapter of the Insurance Code which provides for the establishment of reciprocal exchanges.[4] More importantly, since the Texas laws have changed since the *Baer* court made its determination, its holding has no further relevance to the issue.

Even if the statute itself were not enough, Texas case law also makes clear that reciprocal interinsurance exchanges are considered corporate entities for various purposes. For example, in *Kiepfer v. Beller,* the Fifth Circuit looked to the Texas Business Corporation Act to determine whether a director of a reciprocal insurance exchange was an agent of the exchange such that the exchange could be held liable for his actions. *Kiepfer v. Beller,* 944 F.2d 1213, 1217-18 (5th Cir. 1991) (citing Tex. Bus. Corp. Act, art. 9.14).

Long before this statutory definition of an exchange as a corporation was enacted, a Texas court of appeals

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[4] Indeed, as set forth in USAA's own brief in *Pridgin v. USAA,* United States District Court, Middle District of Georgia, Civil Action No. 84-247-ALB-AMER, a true and correct copy of which is attached as Exhibit A, USAA completely discredited the *Baer* decision and argued that it should be disregarded in federal diversity determinations. The fact that USAA disparaged *Baer* in one case, yet uses it in support of its position in this case, is yet another graphic example of USAA's penchant for talking out of both sides of its mouth and manipulating the law for its own purposes.

noted that in a reciprocal insurance exchange the subscribers were just like shareholders of a corporation in that their liability to pay their pro rata share of the losses took the place of the capital structure of a corporation. *Wilson v. Marshall,* 218 S.W.2d 345, 346 (Tex. Civ. App. – San Antonio 1949, no writ).

Article 19.03 of the Insurance Code provides that the declaration of the subscribers takes the place of Articles of Incorporation and that free surplus will constitute the capital structure of the exchange. Moreover, Article 19.13, added in 1987, makes the Texas Business Corporation Act relating to indemnification of officers and directors govern reciprocal or interinsurance exchanges.

This treatment of a reciprocal insurance exchange as a corporation comports with the way Congress has treated associations, specifically interinsurance exchanges, with regard to federal taxes and bankruptcy. In *Republic Underwriters v. Ford,* 100 F.2d 511, 514 (5th Cir. 1938), the Fifth Circuit held that the Texas state courts treated reciprocal exchanges like insurance companies, subject to applicable insurance laws; therefore, the Fifth Circuit held them to be insurance corporations under the bankruptcy law. The same is true under federal taxation law.

In *Kurzner v. United States,* 413 F.2d 97, 101-02 (5th Cir. 1969), the Fifth Circuit quoted a federal tax regulation which included in its definition of "association" an interinsurance exchange operating through an attorney-in-fact; however, as is still correct today, the IRS Code definition of "corporation" includes associations and insurance companies, but distinguishes partnerships and

trusts from corporations. 3A Z. Cavitch, *Business Organizations with Tax Planning*, sect. 64.02 (1991). The corporate characteristics which distinguish corporations from partnerships and trusts are as follows: (1) associates; (2) business purpose; (3) centralized management; (4) continuity of life; (5) limited liability; and (6) free transferability of interests. *Id.* Under the dictates of *Larsen v. Commissioner*, 66 T.C. 159 (1976), if an entity has more corporate characteristics than not, then it is a corporation as opposed to a partnership or trust, for federal tax purposes.

There are some Texas cases which have held that a reciprocal insurance exchange is not a corporation; but they predate the 1987 amendment to the Texas Miscellaneous Corporation Laws Act which defined as a corporation any association organized under the Insurance Code. Tex. Rev. Civ. Stat. Ann., art. 1302-7.06 (Vernon Supp. 1991). The court in *Hill v. Blanco National Bank*, 179 S.W.2d 999, 1005 (Tex. Civ. App. – Galveston 1944, writ ref'd w.o.m.), held that a reciprocal exchange was not a statutory entity. That simply is an incorrect statement of the law under the plain language of the statute and under subsequent case law interpretation. *Highway Insurance Underwriters v. Reed*, 221 S.W.2d 925, 926 (Tex. Civ. App. – Austin 1949, no writ), held that a reciprocal exchange was an association and not a corporation; however, in addition to the opinion's predating article 1302-7.06, the parties had also stipulated that the exchange was neither a corporation nor a partnership.

The Second Circuit in *Baer* premises its holding that a reciprocal exchange is an unincorporated association on the references in Insurance Code articles 19.03 and 19.06 to a stock insurance company – which the *Baer* court finds

must be different from a reciprocal exchange. The statute, however, never states that an exchange is an unincorporated association. Furthermore, the amendment of the article 1302-7.06 definition of "corporation" in 1987 overrides the *Baer* distinction.

Also in the 1987 amendments, the Texas legislature altered the provisions regarding service of process on an insurance company. Tex. Insur. Code Ann., art. 1.36 (Vernon Supp. 1991). Prior to that time, there was a separate provision for service on a reciprocal exchange. Tex. Insur. Code Ann. art. 19.04 (Vernon 1981) (repealed in 1987; see, now, art. 1.36). Under 1.36, all domestic insurance companies, including reciprocals, are to be served with process in the same manner – by serving the president, active vice-president, secretary, or attorney-in-fact at the home office or principal place of business of that carrier. Tex. Insur. Code Ann., art. 1.36, sect. 2a (Vernon Supp. 1991).

If the Texas legislature ever intended any distinction be made between a stock insurance company and a reciprocal insurance exchange, the 1987 amendments to the Insurance Code and the Texas Miscellaneous Corporation Laws Act obliterated that distinction. Since Texas statutory and case law clearly deem a reciprocal interinsurance exchange to be a corporation, and since, under *Carden*, no inquiry beyond that statutory designation is necessary or proper, it is manifestly clear that USAA is to be considered a corporation for purposes of the subject matter jurisdiction determination in this case.

3.

DIVERSITY JURISDICTION MAY BE MAINTAINED BY ALLOWING AN AMENDED COMPLAINT WHICH NAMES DIVERSE SUBSCRIBERS OF UNITED SERVICES AUTOMOBILE ASSOCIATION AS REPRESENTATIVES OF A DEFENDANT CLASS.

It is abundantly clear that under *Carden* and under Texas law, USAA is a corporation for purposes of the jurisdictional determination to be made here. However, even if there was any doubt regarding USAA's corporate status, this Court would not be required to relinquish jurisdiction. Diversity jurisdiction could be maintained through the amendment of the original complaint. In the amendment plaintiffs would drop USAA as a party and name the Texas citizens that control us, as representatives of a defendant class consisting of USAA's many subscribers. Rule 23.2 of the Federal Rules of Civil Procedure authorizes such a class action.

Complete diversity of citizenship would exist under such an amendment because the Plaintiffs, as California domiciliaries, would be suing only the Texas individuals and corporations that actually run the business of USAA. Even though USAA claims over 180,000 California subscribers, the citizenship of these unnamed members of the defendant class is irrelevant to the existence of diversity jurisdiction. The Supreme Court initially announced this rule for determining citizenship in a class action in *Supreme Tribe of Ben-Hur v. Cauble,* 225 U.S. 356, 41 S.Ct. 338, 65 L.Ed. 673 (1921). Subsequently, the Court accepted without discussion the irrelevance of unnamed class members' citizenship in *Snyder v. Harris,* 394 U.S. 332, 340, 89 S.Ct. 1053, 1059, 22 L.Ed.2d 319 (1969).

The rule – considering only the citizenship of the named representatives – also has been applied in class actions brought pursuant to Rule 23.2. In *Kerney v. Fort Griffin Fandangle Association, Inc.*, 624 F.2d 717 (5th Cir. 1980), the plaintiff had unsuccessfully sought leave in the district court to amend his complaint to name, as a defendant class, the members of an association. The Fifth Circuit held that the plaintiff should have been allowed to amend and that his class action was authorized by Rule 23.2. 624 F.2d at 722. In addition, the court held that the plaintiff could satisfy the requirement of complete diversity by naming diverse representatives of the association and by dropping the association itself as a named party. 624 F.2d at 720. To the same effect is *Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 85 (2d Cir. 1990) *cert. denied*, ___, 111 S.Ct. 1430, 113 L.Ed.2d 484 (1991).

This Court has authority under Rule 15(a) of the Federal Rules of Civil Procedure to allow an amendment of the complaint to correct any jurisdictional flaws discovered in the original. Rule 15 states that leave of court "shall be freely given when justice so requires." Given the history of USAA's actions in federal court, it stands in an awkward position to claim that it would be prejudiced by such an amendment. Moreover, amendment of the complaint was strongly suggested as a jurisdictional cure for the difficulties caused by the same defendant in *Tuck v. United Services Automobile Association*, 859 F.2d 842, 846 (10th Cir. 1988).

Rule 23.2 of the Federal Rules of Civil Procedure expressly provides that an action may be maintained "against the members of an unincorporated association as

a class by naming certain members as representative parties." Those who promulgated the Rule (the Advisory Committee, the Supreme Court, and Congress) added only one limitation on the certification of such a class action – that it may proceed "only if it appears that the representative parties will fairly and adequately protect the interests of the association and its members."

Contrary to the plain language of Rule 23.2, some courts have engrafted a further limitation on the Rule. These courts have held that a Rule 23.2 class cannot be used in federal court where state law gives the unincorporated association capacity to sue or be sued in its own name – that is, where state law gives an unincorporated association jural status. See *Northbrook Excess and Surplus Insurance Company v. Medical Malpractice Joint Underwriting Association*, 900 F.2d 476, 478-79 (1st Cir. 1990); *Suchem, Inc. v. Central Aguirre Sugar Co*, 52 F.R.D. 348, 355 (D.P.R. 1971). *Patrician Towers Owners, Inc. v. Fairchild*, 513 F.2d 216 (4th Cir. 1975) was cited in *Northbrook* for this proposition as well, but the court in *Patrician Towers* noted but did not decide the issue. 513 F.2d at 220-21. In *Northbrook*, the First Circuit relied on the reasoning of *Suchem*, but the court in *Suchem* refused to allow a Rule 23.2 class both because the association had jural status and because the 11-member association did not satisfy the numerosity requirement of Rule 23(a). 52 F.R.D. at 352, 355.

Other courts have refused to create this "jural-status exception" to Rule 23.2. See *Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 87 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1430, 113 L.Ed.2d 484 (1991); *Kerney v. Fort Griffin Fandangle Association, Inc.*, 624 F.2d

717, 720 (5th Cir. 1980); *Lumbermen's Underwriting Alliance v. Mobil Oil Corporation*, 612 F. Supp. 1166, 1170 (D. Idaho 1985), aff'd 835 F.2d 1435 (1987).

In *Schiavone v. Fortune*, 477 U.S. 21, 106 S.Ct. 2379, 91 L.Ed.2d 18 (1986), the Supreme Court refused to accept an "identity-of-interest" exception to Rule 15(c) of the Federal Rules of Civil Procedure. The Court stated that the language of the Rule itself was central to the resolution of the issue. *Schiavone, supra*, 477 U.S. at 29, 106 S.Ct. at 2384. It went on to say that the choice was not between a liberal or a technical interpretation of Rule 15(c), but was, instead, a choice "between recognizing or ignoring what the Rule provides in plain language." The Court's choice was to "accept the Rule as meaning what it says." 477 U.S. at 30, 106 S.Ct. at 2384.

The plain language of Rule 23.2 does not support the creation of a jural-status exception. The Rule by its own language recognizes only one limitation – that the named representatives fully and fairly represent the interests of the association and its members. Since the drafters were able to write this limitation into Rule 23.2, one can conclude that they could have included a jural-status exception had such been intended.

Nevertheless, the First Circuit in *Northbrook* found support for its jural-status exception in the Advisory Committee Note to Rule 23.2. See 900 F.2d at 477. In the first sentence of the Note, the Advisory Committee observes that suits by or against representatives of an unincorporated association have often been viewed as class actions and that the "real or main purpose of this

characterization" was to grant entity status to associations that did not have jural status under Rule 17(b). From this comment, the *Northbrook* court concluded that the sole purpose of Rule 23.2 was to provide a class action only where state law did not give the association jural status. 900 F.2d at 478.

Although the Advisory Committee Note is to be given some weight in interpreting the Rule, we must here first interpret the Note. The more reasonable interpretation is that the drafters had concluded that, having proved valuable in overcoming the lack of an association's jural status, the class action device should be generally available. See *Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 87 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1430, 113 L.Ed.2d 484 (1991). If the drafters had in mind only the limited purpose ascribed to Rule 23.2 by the court in *Northbrook*, they could have more easily accomplished this result by extending to diversity cases Rule 17(b)'s grant of capacity to unincorporated associations in federal question cases. They could have thereby avoided drafting Rule 23.2 altogether. In the alternative, the drafters could have included the jural-status exception in the language of Rule 23.2, as noted above.

In the second sentence of the Advisory Committee Note to Rule 23.2, the drafters cite, as an example of their observation in the first sentence, the case of *Oskoian v. Canuel*, 269 F.2d 311 (1st Cir. 1959). *Oskoian* predated the adoption of Rule 23.2 and was a diversity case appealed from the United States District Court for the District of Rhode Island. The plaintiffs in *Oskoian* sought to sue a union by describing it as a defendant class under Rule 23.

Rhode Island law gave unincorporated associations entity status, 269 F.2d at 314, and allowed suit against their individual members, 269 F.2d at 314-15. The issue in the case, however, was whether the federal class action, which would be binding on the members of the union, could be maintained even though Rhode Island law prohibited such a binding class action. The court held that the Rule 23 class action could be maintained. 269 F.2d 316-17.

If the drafters had intended to restrict use of Rule 23.2 to those cases in which state law denied entity status to an unincorporated association, *Oskoian* would not have been cited as an example. The First Circuit in *Northbrook* observed that its earlier decision in *Oskoian* had no binding effect on the interpretation of Rule 23.2 because that decision predated the adoption in 1966 of Rule 23.2. *Northbrook*, 900 F.2d at 479. However, because of the citation of *Oskoian*, the Advisory Committee Note more clearly supports the proposition that Rule 23.2 applies even where state law grants entity status to unincorporated associations. See *Lumbermen's Underwriting Alliance v. Mobil Oil Corporation*, 612 F. Supp. 1166, 1170 (D. Idaho 1985), aff'd, 835 F.2d 1435 (1987); 7C C. Wright, A. Miller, & M. Kane, *Federal Practice and Procedure*, sec. 1861, at p. 223 (2d ed. 1986).

Another argument made for the restrictive approach to Rule 23.2 in *Northbrook* was that application of the Rule as it reads would allow the manufacture of diversity jurisdiction. See 900 F.2d at 478. However, even *Northbrook's* restrictive view allows a Rule 23.2 class in some cases. In these cases, therefore, diversity jurisdiction could be "manufactured" by naming class representatives

whose citizenship differs from that of the opposing parties. In reality, the undifferentiated concern for the protection of federal jurisdiction offers no special support for the argument that Rule 23.2 should be limited by a jural-status exception. Or, to put it another way, this undifferentiated concern could be used to justify any limit on a Federal Rule of Civil Procedure that had the effect of preventing the use of the Rule's procedural advantages to establish federal diversity jurisdiction.

Rule 23.2 is a purely procedural rule that allows the choice of certain named parties not unlike the choices available under Rules 20 and 23 of the Federal Rules of Civil Procedure. This procedural discretion necessarily carries with it the ability to name only diverse parties and thus to secure the benefits of a federal forum. No reason suggests itself for singling out Rule 23.2, rather than Rule 23 or Rule 20, for a restrictive reading simply because one of its advantages may be the maintenance of a diversity action. Although only indirectly related to this point, the Supreme Court has recently approved the decision of an appellate court to use Rule 21 in order to drop a non-diverse party so that diversity jurisdiction could be maintained for a judgment. *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 109 S.Ct. 2218, 104 L.Ed.2d 893 (1989).

In *Suchem, Inc. v. Central Aguirre Sugar Co*, the district court held that a Rule 23.2 class action must satisfy the requirements of Rule 23(a) before it could be certified. 52 F.R.D. at 355. This restriction finds no support either in the language of Rule 23.2 or in its Advisory Committee Note. To the contrary, Rule 23.2 explicitly refers only to the provisions of Rule 23(d) and Rule 23(e), leaving one

to assume that the other parts of Rule 23 are inapplicable. Furthermore, the Advisory Committee Note to Rule 23.2 ends with the following sentence: "Ruled 23.2 deals separately with these actions, referring where appropriate to Rule 23." This language and the plain language of Rule 23.2 strongly suggest that the requirements of Rule 23(a) are not prerequisites to a Rule 23.2 class action. See *Curley v. Brignoli, Curley & Roberts Associates*, 915 F.2d 81, 86 (2d Cir. 1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 1430, 113 L.Ed.2d 484 (1991).

However, if this Court were to find that Rule 23(a) is applicable to a Rule 23.2 class action, the requirements of Rule 23(a) would be satisfied in this case. Often the most troublesome of Rule 23(a)'s prerequisites is the requirement of sufficient numerosity, but that requirement is obviously satisfied in this case since USAA has more than 180,000 subscribers in California alone. In fact, the very nature of this case proves the value of a Rule 23.2 or Rule 23 class action. The defendant class, made up of hundreds of thousands of individuals who are in reality only USAA's insurance clients, would be represented fairly and adequately by USAA's Texas attorney-in-fact and by the Texas corporations that make and implement USAA's business policies. These Texas citizens would, in any case, control the representation of USAA, and a class action frames this litigation in accordance with the real nature of this entity. Even though Texas law does not determine the applicability of Rule 23.2, it is suggestive to note that a reciprocal exchange can be sued as a defendant class in Texas courts. See *Richardson v. Kelly*, 191 S.W.2d 857, 860-61 (Tex. 1945), cert. denied, 329 U.S. 798, 67 S.Ct. 487, 91 L.Ed. 683 (1947).

A Rule 23.2 class action, naming as representative parties those who actually control USAA, is the most reasonable procedure for overcoming the rather preposterous legal fiction which appears to suggest that USAA is little more than an association of hundreds of thousands of equal partners.

4.

CONCLUSION

Texas statutes and case law make it clear that USAA is deemed a corporation under Texas law. Accordingly, it should be treated as a corporation for purposes of diversity. Additionally, this Court would have jurisdiction pursuant to an amendment to the existing pleadings under Rule 23.2. For these reasons, this Court should retain jurisdiction of this matter.

There never has been a case where sanctions are more warranted to preserve the integrity of the judicial process. The federal court system itself has been a victim of USAA's jurisdictional manipulation resulting in countless hours, days, weeks and months of wasted judicial time. Likewise, litigants have paid money erroneously and attorneys have wasted valuable time. This has all resulted from USAA's wrongful conduct which has been perpetrated over a course of many years, demonstrating a pattern of abuse. It is important that this Court exercise its sound discretion, under its inherent power, to send the appropriate message in a way that makes sense from both the standpoint of reimbursing the government for its lost judicial resources as well as the important factor of deterrence. The fact that USAA offers no apologies for its

conduct is an aggravating circumstance that should be considered by this Court. USAA's argument that the federal courts have no power to sanction a litigant for years of abusing the federal process, simply because that conduct has been recently discovered, is a shallow argument which only suggests to any objective observer that USAA has no remorse for its actions.

Accordingly, a significant sanctions award is compelling.

Dated this 9th day of December, 1991 at Claremont, California.

Respectfully submitted,
SHERNOFF, BIDART & DARRAS

By: /s/
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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	CASE NO: 91 3615 WFN (GHKx) DECLARATION OF BILL SOUZA IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL BRIEFING AS ORDERED BY COURT IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF REQUEST FOR SANCTIONS [Judge Wm. Fremming Nielsen]

Attached hereto is the Declaration of Bill Souza in support of plaintiffs' supplemental briefing as ordered by court in opposition to motion to dismiss and in support of request for sanctions.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED STATES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 WFN DECLARATION OF BILL SOUZA IN OPPOSITION TO MOTION TO DISMISS

I, BILL SOUZA, DECLARE:

1. I am the Assistant Vice President and Claims Manager of Hawaiian Insurance and Guaranty Company, Ltd., ("HIG") a Hawaii Corporation. It is my responsibility to monitor claims litigation involving HIG. As a result, I am personally aware of and knowledgeable about the payment of the judgment in the action brought by United Services Automobile Association ("USAA")

against HIG, Case numbers CA No. 88-2941, CV-84-0300-ACK and CV-87-0483-ACK (consolidated).

2. As the result of the judgment in the action brought by USAA, HIG paid USAA the total amount of $391,343.50. That sum was paid in installments, the first in the amount of $353,417.88 on December 19, 1989, the second in the amount of $37,549.20 on March 8, 1990 and the third and final installment in the amount of $376.32 on April 13, 1990.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on December 7th, 1991 at Honolulu, Hawaii.

/s/ Bill Souza
BILL SOUZA
Declarant

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On DEC. 10 1991, I served the foregoing document described as:

DECLARATION OF BILL SOUZA IN SUPPORT OF PLAINTIFFS' SUPPLEMENTAL BRIEFING AS ORDERED BY COURT IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF REQUEST FOR SANCTIONS

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy

thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
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1801 Century Park East
Ninth Floor
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90067
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Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[X] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

Paul R. Fine, Esq. (213) 556-2807 at approximately 11:30 AM on December 10, 1991.

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on DEC. 10 1991, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendants.	CASE NO. 91 3615 WFN DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND IN OPPOSITION TO REQUEST FOR SANCTIONS (Judge Wm. Fremming Nielson) Trial Date: March 3, 1992

COMES NOW Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") and, pursuant to the

Court's direction, submits its Supplemental Brief In Support of Motion To Dismiss For Lack Of Subject Matter Jurisdiction And In Opposition To Request For Sanctions as follows.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, vs. UNITED STATES AUTOMOBILE ASSOCIATION, Defendants.	CASE NO. 91 3615 WFN DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION AND IN OPPOSITION TO REQUEST FOR SANCTIONS (Judge Wm. Fremming Nielson) Trial Date: March 3, 1992

INTRODUCTION

In their supplemental brief, Plaintiffs LAUGHLIN E. WATERS and VOULA D. WATERS appear to agree with USAA: (1) that this Court lacks subject matter jurisdiction under the Supreme Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), unless USAA is a corporation under Texas law (Supp. Br. 18-19); (2) that sanctions cannot be awarded unless USAA acted improperly in this action (Supp. Br. 6, 8-9); and (3) that it is proper for "USAA [to] bring a motion to dismiss when a federal case is filed against it" (Supp. Br. 9).

Plaintiffs nonetheless argue that maintenance of this action in federal court is permissible and that sanctions are appropriate. Plaintiffs are wrong. First, under Texas law, USAA is a reciprocal insurance exchange – an artificial entity that, as a matter of statute, is distinct from a corporation. The Texas statute from which Plaintiffs selectively quote (Supp. Br. 18) does not support a contrary result.

Second, contrary to Plaintiffs' suggestions (Supp. Br. 6,8), there is no basis for sanctioning USAA for failing to apprise the Court of the argument that USAA is a corporation or should be treated "like" a corporation. As noted, USAA is a reciprocal insurance exchange, which Texas law makes clear is a type of unincorporated association, not a corporation. In addition, the United States Supreme Court's decision in *Carden* foreclosed the argument that a non-corporate entity can be treated "like" a corporation for diversity purposes. Thus, USAA cannot conceivably be sanctioned for failing to advise the court of these arguments. In any event, USAA did advise this Court of

the Tenth Circuit's decision in *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989), which described the history of USAA's federal diversity litigation.

Finally, Plaintiffs err in suggesting (Supp. Br. 24-33) that, even if this Court lacks subject matter jurisdiction, they should be permitted to amend their complaint to restructure this suit as a class action against USAA's individual members. Such a step is legally impermissible.

While USAA believes that Plaintiffs' arguments are meritless, it wishes to assure this Court that it takes seriously its obligation to avoid appearing in federal court in diversity cases and acknowledges that its past record in this regard has been flawed. A number of factors no doubt contributed to this situation. USAA's jurisdictional status as a reciprocal insurance exchange makes it unique among the country's largest insurers. USAA utilizes over 3000 outside counsel to manage its large (over 15,000 case) litigation docket, and gives these outside counsel considerable autonomy in handling individual cases. These local counsel (most of whom routinely handle litigation for other insurers in federal court) were not always familiar with USAA's non-corporate status. Even within USAA, litigation is managed on a very decentralized basis, with regional claims personnel and file handlers having primary responsibility for monitoring ongoing litigation.

Following the decision in *Carden* and *Tuck*, USAA has moved to implement a litigation policy consistent with the principles laid down in those cases. For example, USAA sent an internal memorandum to all of its senior

claims attorneys, claims attorneys, litigation supervisors, and casualty file handlers advising them of the situation and instructing them that "USAA should appear neither as a plaintiff nor defendant" in diversity actions; sent a memorandum to over 3200 outside counsel directing them to refrain from litigating in federal court; and prepared a special litigation manual for outside counsel that highlighted the jurisdictional issue. USAA also has determined to conduct annual reviews to remind claims personnel and outside counsel of this policy and to annually monitor compliance. USAA's actions in this case are part of this established policy to comply with *Carden* and *Tuck*.

ARGUMENT

I. USAA Is a Reciprocal Insurance Exchange, Which Under Texas Law Is Considered To Be An Unincorporated Association Rather Than A Corporation

The resolution of USAA's motion to dismiss for lack of subject matter jurisdiction is controlled by the Supreme Court's 1990 *Carden* decision. In *Carden*, the Court addressed the proper status of a limited partnership for diversity purposes. The Court noted that the "[t]he precise question posed under the terms of the diversity statute is whether [the] entity may be considered a 'citizen' of the State under whose laws it was created." 494 U.S. at 187. While corporations had long been considered to be citizens of their States of incorporation, the *Carden* Court announced that it would "firmly resist[] extending that treatment to other entities." *Id.* at 189. Rather, for the "wide assortment of artificial entities" that "[t]he 50 States have created, and will continued[sic] to create," the

Court held that their citizenship must be measured by the citizenship of each of their members:

> In sum, we reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. . . . [Rather,] a suit by or against the entity depends on the citizenship of all the members.

Id. at 195-97 (quotation omitted). Thus, under *Carden*, the question is not precisely what type of artificial entity USAA is, but whether USAA is considered to be a corporation under Texas law. A review of the relevant Texas statutes and cases makes clear that it is not; USAA is a reciprocal insurance exchange, a particular type of artificial entity created by the Texas Insurance Code that is distinct from a corporation and that is most accurately characterized as an unincorporated association.

A. Texas Law Establishes Reciprocal Insurance Exchanges as Distinct Statutory Entities

A reciprocal insurance exchange is a type of insurance organization that is recognized in most states, and that can be generally defined as "an association of individuals or juristic entities, providing insurance among themselves and operating through a person or corporation that serves as attorney-in-fact." R. Keeton, *Insurance Law* 21 (1971).[1] In Texas, reciprocals are regulated by a

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[1] *See also* 18 J. Appleman, *Insurance Law & Practice* § 10121, at 224 (1945) ("A reciprocal or interinsurance 'exchange' is an

(Continued on following page)

special chapter of the Texas Insurance Code, Chapter 19. This Chapter provides the basic "authori[ty] to exchange reciprocal or interinsurance contract." Tex. Rev. Civ. Stat. Ann. art. 19.01. Under this arrangement, an individual subscriber is both an insurer and an insured, paying in premiums that are pooled with other premiums to create a fund to pay losses incurred by the reciprocal's subscribers. *Id.* art. 19.01. Each subscriber appoints an "attorney in fact" to issue the insurance contracts and to conduct the "business of the exchange." *Id.*, art. 19.02.[2]

Texas law is careful to establish reciprocal exchanges as particularized entities, distinct from regular insurance corporations. The statute expressly directs that "[t]he office or offices through which such indemnity contracts shall be exchanged shall be classified as reciprocal or interinsurance exchanges." Tex. Rev. Civ. Stat. Ann. art.

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association of persons cooperating through an attorney in fact for the purpose of insuring themselves and each other. Such insurance has been held distinguishable from all other forms of insurance, in that every insured is an interinsurer, and every insurer is an insured.") (footnotes omitted).

[2] The attorney in fact is required to file a "declaration of subscribers" with the Texas Board of Insurance Commissioners. Tex. Rev. Civ. Stat. Ann. art. 19.03. This declaration must set forth the "name or title of the office at which subscribers propose to exchange . . . indemnity contracts"; the "kind or kinds of insurance to be . . . exchanged"; and"[t]he location of the office or offices from which such contracts or agreements are to be issued." *Id.* The attorney in fact also is required to obtain a certificate of authority from the Commissioner, which licenses him and authorizes him to conduct the business of the reciprocal exchange. *Id.*, art. 19.10.

19.03(1). Likewise, the Insurance Code definition of "person" includes various types of entities, but specifically distinguishes "reciprocal exchanges" from "corporations": "person [means] any individual, *corporation*, association, partnership, *reciprocal exchange*, interinsurer, Lloyds insurer, fraternal benefit society, and any other legal entity engaged in the business of insurance." *Id.*, art. 21.21(2)(a) (emphasis added). Indeed, the Insurance Code Chapter establishing reciprocal exchanges expressly distinguishes these entities from corporations by specifying that a reciprocal exchange can limit its subscribers' contingent liabilities "if the free surplus [of the reciprocal] is equal to the minimum capital stock and minimum surplus required of a stock company transacting the same kinds of business." *Id.*, art. 19.03(3).[3] Any possible doubt concerning the distinctive nature of reciprocal exchanges is removed by the final article of the Chapter on reciprocal exchanges, which provides that "[r]eciprocal or intrinsurance exchanges shall be exempt from the operation of all insurance laws of this State except as in this Chapter specifically provided, or *unless reciprocal or interinsurance exchanges are specifically mentioned in such other laws.*" *Id.*, art. 19.12 (emphasis added).

This distinction between reciprocal exchanges and corporations is preserved throughout the Insurance Code. Reciprocals are subject to some of the same general regulatory requirements as other types of insurers, including

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[3] "Free surplus" is the amount by which a reciprocal exchange's assets exceed its liabilities, including reserves. *See Archie v. Knox*, 224 S.W.2d 504, 506 (Tex. Civ. App. – Austin 1949, writ ref'd n.r.e.).

corporations, but the statute acknowledges the different nature and structure of reciprocal exchanges. For example, while corporations must submit their "articles of incorporation" to the Board of Insurance Commissioners, and must have their "proposed capital structure" analyzed by the Board in order to qualify to conduct insurance business, the Code recognizes that reciprocal exchanges as unincorporated entities, will have neither "articles of incorporation" nor a "capital structure." Tex. Rev. Civ. Stat. Ann. arts. 2.01, 2.04. Rather, the Insurance Code provides that, for reciprocals, the "declaration of subscribers shall be in lieu of Articles of Incorporation," and "[f]ree surplus shall constitute capital structure." *Id.*, art. 19.03(5). This distinction between corporations and reciprocal exchanges is reiterated in the Insurance Code's specification that an insurer is considered insolvent and must cease to do business in Texas when its surplus is "impaired to the extent of more than fifty (50%) per cent of [the] required minimum surplus of a capital stock insurance company, *or in case . . . the minimum surplus of a reciprocal* . . . [is] impaired to the extent of more than sixteen and twothirds[sic] (16 2/3%) per cent of [the] required minimum surplus." Tex. Rev. Civ. Stat. Ann. art. 1.10(5) (emphasis added).[4] These deliberate references

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[4] Similarly, this same article distinguishes corporations from reciprocals in giving the Board of Insurance Commissioners power to sanction "domestic and foreign, stock and mutual life, health, and accident *insurance companies*; domestic and foreign, stock and mutual, fire and casualty *insurance companies*; Mexican casualty insurance companies; domestic and foreign Lloyd's plan insurers; [and] domestic and foreign *reciprocal or interinsurance exchanges*. . . . " Tex. Rev. Civ. Stat. Ann. art. 1.10(7)(h) (emphasis added).

throughout the Insurance Code make clear that reciprocal exchanges are regarded by Texas law as distinct entities, and are not corporations. Rather, reciprocal exchanges are generally regarded as unincorporated associations. *See, e.g., Baer v. USAA*, 503 F.2d 393, 394 (2d Cir. 1974) (noting that "an 'interinsurance exchange' or 'reciprocal insurance association,' both . . . are familiar types of unincorporated associations").[5]

Indeed, it is impossible to consider reciprocal exchange to be a corporation in light of the provisions of the Texas Business Corporation Act. Under Texas law, "a corporation is distinguishable from a mere aggregation of individuals associated for a common purpose in that, even though the latter may be recognized by the law as a unity for purposes of suit, the full import of the term 'corporate entity' is lacking." 15 Tex. Jur. 3d *Corporations* § 1, at 135 (1981) (footnotes omitted). To qualify as a "corporate entity" under Texas law, the entity must have been formed pursuant to the Business Corporation Act. *See* Tex. Bus. Corp. Act art. 1.02. Under the Act, incorporators must prepare articles of incorporation (*id.*, art. 3.01), which must include 13 specific elements (*id.*, art.

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[5] *Accord, e.g.*, 46 C.J.S. *Insurance* § 1412(b), at 734 ("A reciprocal or interinsurance exchange is something more than a partnership and something less than an insurance corporation and falls within the classification of unincorporated companies."); 43 Am. Jur. 2d *Insurance* § 77, at 157 ("reciprocal associations or exchanges have no corporate existence"); *see also* R. Keeton, *Insurance Law* at 21; 18 J. Appleman, *Insurance Law and Practice* § 10121.

3.02),[6] and then must file those articles with the Texas Secretary of State (*id.*, art. 3.03). Only after articles of incorporation are filed does Texas issue a certificate of incorporation designating the artificial entity as a corporation. *Id.*, art. 3.03. USAA, as a reciprocal exchange, has taken none of these steps and thus cannot be regarded as a corporation under the Texas statutes.

Texas case law confirms the distinctive status of a reciprocal exchange. Even Plaintiffs recognize (Supp. 22) that "Texas cases . . . have held that a reciprocal insurance exchange is not a corporation." For example, in *Highway Ins. Underwriters v. Reed*, 221 S.W.2d 925 (Tex. Civ. App. – Austin 1949, no writ), the trial court had held that the defendant, " 'a reciprocal insurance exchange, was and is an 'association' ' for venue purposes. *Id.* at 926 (quoting trial court finding of Fact). The *Reed* Court affirmed, expressly holding that the reciprocal exchange "is an association [for purposes of the venue statute] . . . not a corporation or partnership." *Id.* at 927; *see also Howell v. Knox*, 211 S.W.2d 324, 326-27 (Tex. Civ. App. – Austin 1948, writ ref'd. n.r.e.) (noting that "[t]he reciprocal or interinsurance exchange is a creature of the statutes . . . and its powers, duties, responsibilities and methods

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[6] These elements that must be covered in articles of incorporation include items that clearly are inapplicable to a reciprocal exchange, such as "[t]he aggregate number of shares which the corporation shall have authority to issue," the par value of each of such shares," and the existence of "[a]ny provision limiting or denying to shareholders the preemptive right to acquire additional or treasury shares of the corporation." Tex. Bus. Corp. Act. arts. 3.02(4), (8).

of operation are regulated by statute") (quotations omitted); *Mercer v. Knox*, 192 S.W.2d 884 (Tex. Civ. App. – Austin 1946) (same); *Baer v. USAA*, 503 F.2d at 394-95 (reviewing Texas statutes on reciprocal exchanges). Thus, a reciprocal exchange has been recognized as occupying a unique role under Texas law, with a distinct statutory origin.[7]

Plaintiffs cite no Texas case indicating reciprocal exchanges are corporations under Texas law; instead, they point (Supp. Br. 20-22 (emphasis added)) to several federal court cases suggesting "reciprocal interinsurance exchanges are *considered* corporate entities *for various purposes*."[8] For example, Plaintiffs cite (Supp. Br. 20) *Kiepfer v. Beller*, 944 F.2d 1213 (5th Cir. 1991), in which the Fifth

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[7] Case law from other jurisdictions also recognizes the distinctive nature of a reciprocal exchange as a statutory entity that is considered to be an unincorporated association, not a corporation. *See Casualty Reciprocal Exchange v. Compton*, 633 S.W.2d 463, 464 (Mo. App. 1982) ("[A] reciprocal or interinsurance exchange is something more than a partnership and something less than an insurance corporation, and falls within the classification of unincorporated companies.") (quotations omitted); *See also, e.g., Automobile Club Inter-Insurance Exchange v. Gaertner*, 636 S.W.2d 68, 71 (Mo. 1982) (en banc); *Citizens Automobile Inter-Insurance Exchange v. Andrus*, 70 Idaho 114,212 P.2d 406 (1949);*Industrial Indem. Exchange v. State Bd. of Equalization*, 26 Cal.2d 772, 161 P.2d 222 (1945); *In re Int'l Re-Insurance Corp.*, 32 Del. Ch. 471, 86 A.2d 647 (1952); *Farmers Automobile Inter-Insurance Exchange v. MacDonald*, 59 Wyo. 352, 140 P.2d 905 (1943).

[8] The only Texas case Plaintiffs city (Supp. Br. 21) is *Wilson v. Marshall*, 218 S.W.2d 345 (Tex. Civ. App. – San Antonio 1949, no writ), but their attempt to find support in that case is

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Circuit determined whether a reciprocal exchange's director was acting as an agent of the exchange by considering the general provisions of the Texas Business corporation Act. But in looking to the Business Corporation Act for this limited purpose, *Kiepfer* did not suggest that the Act was generally applicable to reciprocal exchanges. Instead, the Court made clear that it did so only bec10use[sic] the Insurance Code contained no provision dealing with the agency issue, and "[w]hen the Insurance Code fails to address some question of corporate law, it is supplemented by the provisions of the Texas Business Corporation Act to the extent that the Business corporation Act is consistent with the Insurance Code." *Id.* at 1218 n.1 (citing Tex. Bus. Corp. Act art. 9.14).[9] *Kiepfer* therefore does not address the proper characterization of a reciprocal exchange for diversity purposes.[10] Left with no genuine

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unavailing. In *Wilson*, the court noted that subscribers to a reciprocal exchange are the "owners" and thus "stand[] in the position of a stockholder in a stock insurance company." *Id.* at 346. Thus, *Wilson* plainly recognized that the two types of entities are distinct, and merely observed that there was a similarity in one respect.

[9] It clearly would not be "consistent" to read the business Corporation Act to override the Insurance Code's careful distinction between reciprocal exchanges and corporations.

[10] Likewise, Plaintiffs' attempt (Supp. Br. 21-22) to find support in cases applying federal bankruptcy statutes or federal tax regulations is misplaced. *Republic Underwriters v. Ford*, 100 F.2d 511 (5th Cir. 1938), deals with the proper interpretation of federal bankruptcy laws. Moreover, as one of Plaintiffs' own cases (Supp. Br. 21 notes, "an entity may be a corporation for federal tax purposes even though it is something less under

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case authority, Plaintiffs attempt to distinguish the Texas cases by claiming they are no longer good law in light of a 1987 amendment to the Texas Miscellaneous Corporation Laws Act.

B. Plaintiffs' Effort to Rely On A 1987 Statute To Characterize Reciprocal Exchanges As Corporations Is Unfounded.

There is no support for Plaintiffs' suggestion (Supp. Br. 18-24) that this 1987 amendment to the Texas Miscellaneous Business Corporation changed the legal status of reciprocal exchanges under Texas law from unincorporated associations to corporations. The provision they cite, Article 1302-7.06(A)(2), does provide a definition or "corporation," *but that definition is for the limited purpose of authorizing Texas entities to eliminate their directors' liability for actions undertaken in good faith.* In claiming it has broader applicability, Plaintiffs have misquoted and fundamentally misread the statue.

The limited purpose of Article 1302-7.06(A)(2) is made clear in the very title of the Act; this provision was enacted in 1987 as "An Act relating to liability of certain directors of certain corporations and associations." Acts 1987, 70th Leg., ch. 424 *cited in* Tex. Rev. Civ. Stat. Ann.

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state law." *Kurzner v. United States*, 413 F.2d 97, 104 (5th Cir. 1969). Thus, federal bankruptcy or tax law hardly shed light on the proper categorization of a reciprocal exchange under Texas state law.

§ 1302-7.06, Title of Act (Vernon Supp. 1991).[11] Likewise, the text of the statute, which Plaintiffs quote in an incomplete fashion, makes it clear that the definition does not have the broad applicability they suggest. Specifically, part A of the article provides that:

> A. *In this article*: . . .
>
> (2) "Corporation" means:
>
> (a) Any corporation, association, or other organization incorporated or organized under the Texas Business Corporation Act, the Texas Nonprofit Corporation Act . . . , The Texas Banking Code of 1943 . . . , the Insurance Code . . . , the Texas Savings and Loan Act . . . , the Texas Credit Union Act . . . , the Cooperative Association Act . . . , The State Housing Law . . . , the Electric Cooperative Corporation Act . . . , the Telephone Cooperative Act . . . , The Texas Professional Association Act . . . , the Texas Mutual Trust Investment Company Act . . . , the Health Facilities Development Act . . . , the Texas Transportation Corporation Act . . . , the Cultural Education Facilities Corporation Act . . . , the Hospital Authority Act . . . , or the Higher Education Authority Act. . . .

Tex. Rev. Civ. Stat. Ann. art. 1302-7.06(A)(2) (citations and references to some Acts omitted; emphasis added). Plaintiffs' quotation of this provision (Supp. Br. 18) inexplicably omits the highlighted introductory clause, which

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[11] *Accord, e.g.*, Chadwick, *Corporations and Partnerships*, 42 Sw. L.J. 249, 266 (1988) (noting purposes of Article 1302-7.06) was to "encorage qualified persons to serve as directors by reducing their exposure to liability").

emphasizes the definition's limited scope. It is only this omission that allows Plaintiffs to argue that the definition renders a reciprocal exchange a corporation for all purposes under Texas law.[12]

Indeed, Plaintiffs' reading of Article 1302-7.06(A)(2) would not only turn reciprocal exchanges into corporations for all purposes, but would convert a wide variety of other unincorporated entities into corporations as well. For example, entities organized under the Texas Professional Association Act fall within the scope of Article 1302-7.06(A)(2), and thus, under Plaintiffs' reasoning, would be considered corporations. Yet the Texas Professional Association Act itself makes clear that the artificial entity it establishes is "a professional association, *as distinguished from* either a partnership or *a corporation*." Tex Rev. Civ. Stat. Ann. art. 1528f(2) (emphasis added). In short, Plaintiffs have sought to place more weight on Article 1302-7.06 than that limited provision can possibly bear, and their argument therefore collapses.

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[12] Not only does the introductory clause clearly limit the reach of the definition, but the other portions of Article 1302-7.06 also indicate that the definition sweeps in entities that are generally not considered to be corporations. Thus, for example, subsections (A)(1) includes within the definition of "articles of incorporation" "any other document required to incorporate or organize" one of the specified entities, and "director" is defined to include an individual serving as a "trustee." *Id.*, arts. 1302-7.06(A)(1), (3).

II. There Is No Factual Or Legal Basis For Sanctions Against USAA

USAA's conduct in this case has followed precisely the course of action mandated by the Supreme Court's decision in *Carden* and by the Tenth Circuit's decision in *Tuck*. The complaint in this action was filed on July 5, 1991. Given *Carden's* recent clarification that the citizenship of an artificial entity other than a corporation is determined, for diversity purposes, by reference to the citizenship of each of the entity's members (494 U.S. at 195-96), and given the Tenth Circuit's express directive to USAA to "make . . . motions [to dismiss] in all pending diversity litigation" (859 F.2d at 845 n.3), USAA took the only possible step – it filed its motion to dismiss for lack of subject matter jurisdiction. In its supporting papers, USAA directed the Court's attention to *Tuck*, where the issue of USAA's jurisdictional status and history of litigation in federal court is fully discussed. Thus, USAA's actions were entirely proper and did not constitute the type of abusive, frivolous, or bad faith litigation tactics that warrant sanctions.

In their initial request for sanctions, Plaintiffs suggested (Mem. 26-30) that USAA should be sanctioned here for its conduct in other cases, whether or not USAA had engaged in any misconduct in this case USAA's reply pointed out that Rule 11 does not allow the imposition of sanctions for allegedly wrongful conduct in other cases where no misconduct had occurred in the case before the court. *See Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1185 (9th Cir. 1988); *Burull v. First Nat'l Bank of Minneapolis*, 831 F.2d 788, 790 (8th Cir. 1987), *cert.*

denied, 485 U.S. 961 (1988); ABA *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure*, 121 F.R.D. 101, 111 (1988). Plaintiffs cite no cases, involving either Rule 11 or the courts' inherent authority, that in any way suggest the contrary. Instead, in their supplemental brief, Plaintiffs have changed course, and now argue that sanctions amounting to approximately $1.7 million should be imposed solely because USAA, in its motion to dismiss, did not inform this Court that it had previously taken the position in other cases that it could be characterized as a citizen of Texas for diversity purposes. *See* Supp. Br. 6, 8-9. Plaintiffs' attempt to predicate an unprecedented sanctions award on this alleged failure to cite contrary authority is without support.

First, there is no obligation to include legally incorrect arguments in a pleading filed with this Court. As discussed above (*supra* pp. 5-13), there is no support for the argument that USAA is a corporation under Texas law. Likewise, there is no support for the argument that USAA should be treated "like" a corporation for diversity purposes; indeed, the Supreme Court's recent decision in *Carden* plainly forecloses any such argument.

Plaintiffs suggest (Supp. Br. 8) that USAA should have presented here the arguments it made in *Pridgin v. USAA*, No. 84-247-ALB-AMER (M.D. Ga. filed Nov. 14, 1984), and go so far as to attach USAA'S memorandum in that case to their supplemental brief. In *Pridgin*, USAA removed the case to federal court, and after the plaintiff

moved for remand on the basis of *Baer*, 503 F.2d 393,[13] USAA argued that *Baer* was distinguishable and that the federal court could properly exercise diversity jurisdiction. USAA based its argument primarily on two Supreme Court cases – *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), and *Navarro Savings Ass'n v. Lee*, 46 U.S. 458 (1980) – and on the fact that in the 10 years since *Bear*, it had as a practical matter grown to the point that it operated more like a corporation. *See* Supp. Br., Ex. A at 36-39, 42-43.

In asserting (Supp. Br. 8) that it was error for USAA not to make these same arguments here, Plaintiffs overlook the controlling fact that the Supreme Court in *Carden* expressly and definitively rejected each of the arguments that USAA had made in *Pridgin*. *Carden* ruled that neither *Puerto Rico v. Russell & Co.* nor *Navarro Savings* created exceptions to the rule that the citizenship of an artificial entity for diversity purposes is determined by reference to all of the entity's members. *See* 494 U.S. at 189-92. Similarly, *Carden* expressly rejected the argument, like that made by USAA in *Pridgin*, that "business reality . . . should be taken into account for purposes of determining whether an artificial entity is a citizen." *Id.* at 192. Thus, the arguments made in *Pridgin* were considered and rejected by the Supreme Court. By claiming that USAA nonetheless should be sanctioned, Plaintiffs are making the remarkable suggestion (Supp. Br. 8) that, to

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[13] In *Baer*, the Second Circuit held that USAA was an unincorporated association and should be considered, for diversity purposes, to be a citizen of each state in which it has members. *See* 503 F.2d at 395-96.

avoid sanctions, a litigant must discuss contrary arguments that have been definitively rejected.

The Ninth Circuit already has rejected this standard as a basis for sanctions. In *Golden Eagle Distributing Corp. v. Burroughs Corp.*, 801 F.2d 1531, 1542 (9th Cir. 1986), the court held that:

> neither Rule 11 nor any other rule imposes a requirement that the lawyer, in addition to advocating the cause of his client, step first into the shoes of opposing counsel to find all potentially contrary authority, and finally into the robes of the judge to decide whether the authority is indeed contrary or whether it is distinguishable. It is not in the nature of our adversary system to require lawyers to demonstrate to the court that they have exhausted every theory, both for and against their client.

See also Townsend v. Holman Consulting Corp., 929 F.2d 1358, 1363 (9th Cir. 1990) (en banc); *United States v. Stringfellow*, 911 F.2d 225, 226 (9th Cir. 1990); *Mercury Serv., Inc. v. Allied Bank of Texas*, 117 F.R.D. 147, 157 (C.D. Cal. 1987), *aff'd mem.*, 907 F.2d 154 (9th Cir. 1990). Plaintiffs cite nothing to the contrary; indeed, none of the sanctions cases Plaintiffs cite involve an alleged failure to disclose contrary authority, and simply have nothing to do with the situation presented here. For example, Plaintiffs devote considerable space to discussing (Supp. Br. 9-12) *In re Yagman*, 796 F.2d 1165 (9th Cir. 1986), *cert. denied*, 484 U.S. 963 (1987), *Freeze v. Griffith*, 849 F.2d 172 (5th Cir. 1988), and *Moody v. Miller*, 864 F.2d 1178 (5th Cir. 1989). But these cases offer Plaintiffs no support. In *Yagman*, the trial court imposed sanctions on plaintiffs' counsel for filing a complaint the trial judge deemed frivolous and

for certain discovery abuses. *See* 796 F.2d at 1182, 1186-87. *Yagman* not only thus has no bearing here, but more important, Plaintiffs completely ignore the fact that the Ninth Circuit reversed and held that imposition of sanctions was improper. *Id.* at 1188. *Freeze v. Griffith* is similarly inapposite; it involved the imposition of costs on a pro se prisoner by an appellate court pursuant to 28 U.S.C. § 1915(e),[14] for filing a frivolous appeal. *See* 849 F.2d at 176. Plaintiffs' reference (Supp. Br. 12) to *Moody v. Miller* also does not support their position. In that case, the district court dismissed a pro se prisoner's lawsuit as frivolous and imposed sanctions for court costs. 864 F.2d at 1179.

Finally, *In re Ronco, Inc.*, 838 F.2d 212 (7th Cir. 1988) (cited at Supp. Br. 6-7), also is irrelevant here. In *Ronco*, the court sanctioned counsel for arguing for a continuance on the ground that he had had inadequate time to analyze the legal issue involved due to his very recent appointment as special counsel for a creditors' committee in a bankruptcy proceeding. In fact, however, the attorney had spent considerable time on that exact issue prior to his appointment through his representation of an individual creditor in the same bankruptcy proceeding. This type of nondisclosure is tantamount to an affirmative misrepresentation, and obviously bears no resemblance to the nondisclosure of contrary authority that Plaintiffs

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[14] Section 1915(e) provides, in relevant part, that in an in forma pauperis proceeding, "[j]udgment may be rendered for costs at the conclusion of the suit."

allege took place here.[15] Thus, contrary to Plaintiffs' unsupported assertions, USAA's supposed failure to refer to possible arguments for retaining federal jurisdiction cannot serve as a basis for sanctions.

Second, in any event, the factual premise of Plaintiffs' recasted sanctions argument – that USAA failed to direct this Court's attention to any of the cases in which it had litigated in federal court (Supp. Br. 8-9) – is incorrect. In its motion to dismiss this case, USAA placed almost exclusive reliance on the Tenth Circuit's *Tuck* decision, noting that "*Tuck* is directly on point [and involved] the identical question against the identical defendant." Mem. of Points and Authorities at 5. USAA thus directly referred the Court to, and endorsed, the Tenth Circuit's discussion of USAA's jurisdictional status. In *Tuck*, the court expressly noted:

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[15] In addition, Plaintiffs discuss (Supp. Br. 3-4) *Eash v. Riggins Trucking Inc.*, 757 F.2d 557, 567 (3d Cir. 1985), but only for the unexceptional proposition that federal courts have the inherent authority to impose sanctions. Similarly, Plaintiffs cite (Supp. Br. 5-6) *In re Itel Sec. Litig.*, 791 F.2d 672 (9th Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987), only for the general standard that must be met before sanctions should be awarded pursuant to the courts' inherent authority.

Nor does the Supreme Court's recent sanctions decision in *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123, 2138 (1991) – a case Plaintiffs do not cite – have any bearing here. In *Chambers*, the attorney was sanctioned for, inter alia, telling the trial court that no temporary restraining order was necessary in a suit for specific performance of a contract to sell real estate because no transfer of the properties was in process, when in fact he had already begun arrangements to have the real estate transferred into a trust to put them beyond the reach of the plaintiff. *See id.* at 2128-29.

> the fact that USAA has appeared in federal courts under their diversity jurisdiction, even after the decision in *Baer*, both as plaintiff and defendant, and the question of USAA's corporate status and citizenship was apparently not considered. . . . A few of these cases even recite erroneous findings regarding USAA's diversity status.

859 F.2d 845 n.3 (citations omitted). Not only did the Tenth Circuit discuss the very issue Plaintiffs claim USAA failed to point out to this Court, but it cited some of the very cases that Plaintiffs have included their addendum in support of the request of sanctions. *See id.* (citing *Moore v. USAA*, 819 F.2d 101 (5th Cir. 1987) (Case No. 44 on Plaintiffs' list); *Boardman v. USAA*, 742 F.2d 847 (5th Cir. 1984) (Case No. 87 on Plaintiffs' list); *USAA v. Cregor*, 617 F. Supp. 1053 (N.D. Ill. 1985) (Case No. 52 on Plaintiffs' list)). Thus, USAA referred this Court to *Tuck*'s discussion of precisely what Plaintiffs now complain should have been disclosed – *i.e.*, "USAA's . . . conduct in other cases." Supp. Br. 8. Since Plaintiffs themselves suggest (Supp. Br. 9) that a motion to dismiss which presents the "conflicting rulings" would be appropriate, then by their own standard, their effort to collect sanctions collapses.

Finally, USAA wishes to make clear that it regrets its failure in the past to closely monitor diversity cases in federal court. Following *Tuck*, USAA has moved to correct the deficiencies that allowed the problems to continue. For example, on May 2, 1988 – following its notice to the Tenth Circuit in *Tuck* of the jurisdictional issue and even before the Tenth Circuit's decision – USAA sent a special bulletin on the jurisdictional issue to all regional claims

officials. The bulletin cited *Baer* and instructed these personnel to "take appropriate action to seek dismissal based on the lack of diversity."[16] Then, after the court's strong admonition in the October 14, 1988 *Tuck* decision "to make similar motions [to dismiss] in all pending diversity litigation" (859 F.2d at 845 n.3), USAA reiterated the message on December 12, 1988, in a special memorandum to all senior claims attorneys and supervisors of litigation. The memorandum advised each recipient "to review the *Tuck* decision," and noted that "[t]he court is very strong in its position regarding USAA litigating in Federal Court." Report at 4 (quotations omitted). The memorandum then emphasized that "all future cases will be handled in accordance with the *Baer* decision and the *Tuck* decision." *Id.* (quotations omitted).[17]

When USAA discovered during the second appeal in *Tuck* that its earlier actions had not been sufficient to prevent its participation in federal diversity cases,[18] it promptly took additional steps, which it reported to the Tenth Circuit on December 10, 1990. USAA revised its

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[16] The bulletin is quoted in USAA's report to the Tenth Circuit (the "Report"), a copy of which was filed with USAA's reply memorandum in this case, as Exhibit A to the Declaration of Timothy B. Dyk.

[17] USAA followed up this memorandum with a discussion at a May 10, 1989 legal conference for senior claims attorneys, supervisors of litigation, and regional claims management personnel of the need to ensure that USAA, as an entity, stay out of federal diversity actions. *See* Report at 4.

[18] For example, the appeal in *Transamerica Ins. Group v. Hawaiian Ins. & Guaranty Co.*, 889 F.2d 1096 (9th Cir. 1989) (table), remained pending even after the *Tuck* decision, becoming final on November 21, 1989.

internal docketing procedures and case-tracking system in order to identify cases pending in federal court. Moreover, because the post-*Tuck* cases suggested that local counsel were not being adequately informed of USAA's policy not to litigate in federal court, USAA undertook another round of special notices and bulletins on the jurisdictional issue, this time focusing on the more than 3200 outside counsel that handle litigation for USAA. These outside counsel were sent two special notices on the jurisdictional issue, and were asked to identify any pending federal court cases.[19] In an effort to avoid and detect federal court diversity filings, USAA is annually notifying its outside counsel and claims personnel to stay out of federal court in diversity cases. In addition, USAA is annually reviewing the docketing system in each federal court in the United States to detect any diversity cases that have been filed so that such cases promptly can be dismissed.[20] USAA's actions in this case are part of

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[19] While all outside counsel on USAA's list of approved counsel were so notified, USAA recently has noted that counsel not on the approved list sometimes are retained, and USAA has taken steps to send these counsel the same notices received by counsel on the approved list.

[20] of course, additional cases continue to be filed in federal court against USAA, and despite USAA's memoranda instructing its outside counsel not to file in federal court, counsel occasionally have filed diversity cases on USAA's behalf in federal court. Following the Report to the Tenth Circuit, with one exception, a motion to dismiss or stipulated dismissal was filed in these cases at an early stage, before any decision on the merits. The exception is *Krstich v. USAA*, 1991 U.S. Dist. LEXIS 15746 (N.D. Ohio June 10, 1991), which was filed on October 30, 1989 by an insured basing jurisdiction on diversity of

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this established policy to comply with *Carden* and *Tuck*, and should not serve as the basis for any award of sanctions.

III. Restructuring This Case As a Class Action Is Legally Impermissible And Would Not Promote Judicial Economy

Perhaps recognizing that their basic argument for retaining jurisdiction is foreclosed by *Carden*, Plaintiffs next suggest (Supp. Br. 24-33) that they be allowed to amend their complaint to correct the "jurisdictional flaws" by restructuring the entire case as a class action against USAA's individual members. Regardless of whether this approach would solve the diversity problem,[21] it is impermissible and unwarranted.

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citizenship. A final judgment in *Krstich*, adverse to USAA, was entered on June 10, 1991. *Krstich* unfortunately was not discovered by USAA's management until recently.

[21] USAA believes that it would not cure the jurisdictional problem. Plaintiffs cite *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356 (1921), for the proposition that the citizenship of a class is determined solely by reference to the class representative. But *Supreme Tribe of Ben-Hur* was not a case against an unincorporated association styled as a class action only to create diversity in a suit that was in essence against the entity itself. In such situations, USAA believes that the governing standard is the Supreme Court's recent directive in *Carden* that "to determine, for diversity purposes, the citizenship of an artificial entity, the court [must] consult the citizenship of . . . 'all the [entity's] members.' " 194 U.S. at 195. An attempt to avoid *Carden* by dismissing non-diverse members of the class,

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A. The Federal Rules Of Civil Procedure Do Not Authorize The Class Action That Plaintiffs Propose

The Federal Rules of Civil Procedure authorize a class action against the individual members of an unincorporated association only when the association cannot be sued as an entity under the applicable state law. Specifically, while Rule 23.2 provides a limited mechanism for a class action against the members of an unincorporated association, the Advisory Committee Note makes it clear that the Rule has limited applicability:

> Although an action by or against representatives of the membership of an unincorporated association has often been viewed as a class action, the real or main purpose of this characterization has been *to give "entity treatment" to the association when for formal reasons it cannot sue or be sued as a jural person under Rule 17(b)* [citations omitted] . . . . Rule 23.2 deals *separately* with these actions, referring where appropriate to Rule 23.

Fed. R. Civ. P. 23.2, Advisory Committee Note (emphasis added). Thus, the Note makes clear that Rule 23.2 is designed to deal "separately" with situations in which "the association . . . for formal reasons . . . cannot sue or

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as was done by the district court on remand in *Tuck* (*see Tuck v. USAA*, 722 F. Supp. 100, 102 (N.D. Okla. 1989)), would only lead to further problems concerning the apportionment of any judgment among the diverse and non-diverse members of USAA.

be sued as a jural person under Rule 17(b)." *Id.* That is not the situation here.

Rule 17(b) provides that an unincorporated entity's capacity to be sued is determined "by the law of the state in which the district court is held." Here, as Plaintiffs themselves pointed out in their initial memorandum in opposition (Mem. 24), California law authorizes unincorporated reciprocal exchanges such as USAA to sue and be sued in their own name. *See* Cal. Ins. Code § 1450.[22] Indeed, under California law, an action, such as Plaintiffs seek to create, against the individual subscribers to a reciprocal exchange is not permitted unless "a final judgment has been obtained against the exchange and remains unsatisfied for 30 days." *Id.* § 1451. Because USAA therefore can, and must, "be sued as a jural person," a Rule 23.2 class action is not available. *See* Fed. R. Civ. P. 23.2, Advisory Committee Note.

The overwhelming majority of courts to consider the question have adopted precisely this reading of Rule 23.2 and rejected attempts, like that of Plaintiffs here, to restructure suits against artificial entities as class actions when state law gives those entities the capacity to be sued in their own right. For example, the First Circuit, *Northbrook Excess & Surplus Ins. Co. v. Medical Malpractice Joint Underwriting Ass'n of Mass.*, 900 F.2d 476, 478 (1st Cir. 1990), adopted the Advisory Committee Note's limitation and held that "[r]ule [23.2] may not be used merely to create diversity jurisdiction . . . [because] the

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[22] Texas law also gives a reciprocal exchange the right to sue and be sued in their own name. *See* Tex. Rev. Civ. Stat. Ann. art. 6137.

rule's purpose is to give entity treatment to unincorporated associations where state law does not permit them to sue or to be sued." Moreover, the *Northbrook* Court noted that "most courts that have examined the scope of Rule 23.2's availability" have reached the same conclusion: "where an association has jural status under state law, the rule does not come into play." *Id.* at 478 (citing cases); *accord, e.g., Patrician Towers Owners, Inc. v. Fairchild*, 513 F.2d 216, 220 (4th Cir. 1975); *National Bank of Washington v. Mallery*, 669 F. Supp. 22 (D.D.C. 1987); *Lang v. Windsor Mount Joy Mut. Ins. Co.*, 493 F. Supp. 97 (E.D. Pa. 1980); *Gay Liberation v. University of Missouri*, 416 F. Supp. 1350 (W.D. Mo. 1976), *rev'd on other grounds*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080 (1978); *Lee v. Navarro Savings Ass'n*, 416 F. Supp. 1186 (N.D. Tex. 1976), *rev'd on other grounds*, 597 F.2d 421 (5th Cir. 1979), *aff'd*, 446 U.S. 458 (1980); *Suchem, Inc. v. Central Aguirre Sugar Co.*, 52 F.R.D. 348 (D.P.R. 1971). Thus, both Rule 23.2 and the case law make clear that Plaintiffs' attempt to restructure this suit as a class action should be rejected.

Plaintiffs offer only two arguments in support of their construction of Rule 23.2. Neither withstands analysis.

First, Plaintiffs (Supp. Br. 28-30) distort the meaning of the Advisory Committee Note, which even they concede (Supp. Br. 28) must be consulted in construing Rule 23.2. Specifically, Plaintiffs suggest (Supp. Br. 29) that, although the Note says the mechanism established in rule 23.2 is intended "to give 'entity treatment' to [an] association when for formal reasons it cannot sue or be sued as a jural person," the Note really means that "the class action

device should be generally available." Plaintiffs' sole support for this effort to turn the Advisory Committee Note on its head is the Note's citation of *Oskoian v. Canuel*, 269 F.2d 311 (1st Cir. 1959). But *Oskoian* was cited by the Advisory Committee in *support* of the proposition set forth in the Note – namely, that the class action mechanism is available only when the entity lacks jural status under state law – and in fact does support that proposition.[23] Under the Rhode Island law at issue in *Oskoian*, a suit against the unincorporated entity per se was not authorized. That statute, rather, permitted only an action against all the members of the association, or against the officers " 'as the representative or representatives of such association.' " 269 F.2d at 314 (quoting R.I. Gen. Laws § 9-2-12). Thus, Rhode Island presented precisely the situation in which the Advisory Committee called for use of the class action device: state law did not give the association the right to sue or be sued as a jural person. *See* Fed. R. Civ. P. 23.2, Advisory Committee Note.[24] Plaintiffs' attempt to rely on *Oskoian* as a basis to ignore the Advisory Committee Note therefore is without support.

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[23] The other two cases cited by the Advisory Committee also support the proposition that a class action is available when state law prevents a suit against the entity itself. *Gibbs v. Buck*, 307 U.S. 66, 69 (1939) (Florida law made the association unlawful); *Tunstall v. Brotherhood of Locomotive F. & E.*, 148 F.2d 403, 405 (4th Cir. 1945) (West Virginia law barred suits by the entity in its own name).

[24] This is the same reading of *Oskoian* that the First Circuit itself adopted in *Northbrook*. Plaintiffs' suggestion (Supp. Br. 30) that *Northbrook* improperly distinguished *Oskoian* thus is unavailing.

Second, Plaintiffs point repeatedly (Supp. Br. 25, 27, 29, 32) to *Curley v. Brignoli, Curley & Roberts Assocs.*, 915 F.2d 81 (2d Cir. 1990), *cert. denied*, 111 S.Ct. 1430 (1991), and *Kerney v. Fort Griffin Fandangle Ass'n, Inc.*, 624 F.2d 717 (5th Cir. 1980), and argue that these cases strongly support use of the class action device here. In fact, however, these decisions are readily distinguishable. In both cases, restructuring the suit as a class action was necessary to enable the plaintiffs to secure full relief. For example, *Curley* was a suit by the limited partners of a limited partnership for breach of fiduciary duty by the general partner. *Id.* at 82-83. The limited partners originally filed their suit derivatively, with the partnership itself named as a party. *Id.* But application of *Carden*'s citizenship rule to the partnership destroyed diversity, and when the jurisdictional issue was raised for the first time on appeal, the court ruled that the case should be restructured as a class action. *Id.* at 83-84. While disagreeing with *Northbrook*'s reading of Rule 23.2, the court in *Curley* also based its decision on New York partnership law, which required that plaintiffs use the class action mechanism, rather than a derivative suit, to redress breaches of fiduciary duty by a general partner. *Id.* at 87-88. This precise reading of *Curley* recently was adopted by *900 3rd Ave. Assocs. v. Finkielstain*, 758 F.Supp. 928 (S.D.N.Y. 1991). Although it was, of course, bound by *Curley*, the *Finkielstain* Court read *Curley* to authorize a class action only when state law indicated that a class action was the appropriate mechanism for the lawsuit. *See* 758 F. Supp. at 931-32.

Likewise, the court in *Kerney* determined that a class action was necessary to provide full relief under state

law. The court noted that under the relevant state law, "judgment rendered on an entity suit may be enforced against only the association's property and not that of the individual members." 624 F.2d at 720. Thus, *Kerney* approved an amendment converting the suit to a class action to enable the plaintiff to reach assets that otherwise could not be reached. *Id.* Indeed, *Kerney* expressly distinguished a case, such as the one Plaintiffs seek to create here, that is brought as "a class action rather than an entity suit only in order to select diverse parties as named class representatives and thereby create jurisdiction and not in order to obtain different relief." *Id.* at 720 n.6. Thus, neither *Curley* nor *Kerney* supports the procedural maneuvering that Plaintiffs seek to employ.

B. Plaintiffs' Class Action Approach Would Nullify The Supreme Court's Decision In Carden

Plaintiffs' last-minute attempt to alter the entire structure of this lawsuit by targeting USAA's individual members, rather than the entity itself, is an attempt to evade *Carden*'s holding. The Supreme Court in *Carden* carefully limited the scope of diversity jurisdiction, and noted that any "further adjustments" of the federal courts' role should "be made by Congress." 494 U.S. at 196. Plaintiffs seek to nullify this judgment through an elaborate procedural maneuver; if, as Plaintiffs suggest, an artificial entity could sue or be sued in diversity merely by characterizing the lawsuit as a class action, the *Carden* decision would be rendered meaningless. Indeed, since it relies on *Curley* – a case involving a limited partnership – plaintiffs' approach is not even limited to

unincorporated associations, but extends instead to all artificial entities other than corporations. Such a use of Rule 23.2 is a direct challenge to *Carden*. The court in *900 3rd Ave. Assocs. v. Finkielstain* recently refused to engage in the exact type of procedural subterfuge suggested by Plaintiffs for precisely this reason; the court decided that allowing creation of federal jurisdiction on this back-door fashion would "subvert the Supreme Court's holding in *Carden*." 758 F. Supp. at 931-32. Plaintiffs' attempt to use Rule 23.2 as a procedural device to get around the binding holding of *Carden* should be rejected. The class action mechanism is not available to a plaintiff "seeking to employ Rule 23.2 merely to manufacture diversity jurisdiction." *Northbrook*, 900 F.2d at 479.

C. Use Of A Class Action Mechanism Is Not Warranted In This Case

In all events, use of the class action device suggested by Plaintiffs is not warranted in the circumstances of this case. Plaintiffs argue (Supp. Br. 26) that *Tuck* supports the use of a class action "as a jurisdictional cure for the difficulties caused by [USAA]." But what Plaintiffs neglect to mention is that the only reason the Tenth Circuit in *Tuck* even considered taking this step is that the case had already proceeded through an entire trial, and a jury verdict had been reached, before the jurisdictional issue was uncovered on appeal. *See Tuck*, 859 F.2d at 844.[25] Moreover, in remanding the case, the Tenth Circuit

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[25] Similarly, in *Curley*, the court expressly relied on the importance of preserving "a fully litigated judgment," as a

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noted that "the district court may not be able to find a way" to retain jurisdiction, and that "dismissal of the action" may be required. *Id.* at 846.[26]

Here, no such concerns are implicated. This lawsuit is at its very beginning, and USAA has promptly and properly brought the jurisdictional defect to the Court's attention – as the Tenth Circuit in *Tuck* had expressly instructed it to do. *See Tuck*, 859 F.2d at 845 n.3 (USAA should file "motions [to dismiss] in all pending diversity litigation"). Shifting this litigation to state court would involve no waste of judicial resources, no abandonment of a jury verdict, no extra expense, and no unfairness to any of the parties.

Indeed, in the circumstances of this case, it is proceeding if federal court that would impose a substantial burden. Plaintiffs seek to create an unwieldy class action involving hundreds of thousands of individual members of USAA. *See* Affidavit of Thomas J. Corridan (submitted with Motion to Dismiss) (noting that USAA has 186,556 members domiciled in California alone). Maintenance of such an action would impose on the Court and the parties

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basis for recharacterizing the suit as a class action. *See* 915 F.2d at 91 (quotations omitted).

[26] The district court, in restructuring the case as a class action, did not have the benefit of the First Circuit's 1990 decision in *Northbrook*. Indeed, USAA had appealed the district court's decision to create a class action and intended to argue that the class action device was not available under Rule 23.2 and the recently-decided *Northbrook* case. *Tuck* was settled, however, before the briefing was completed and the Tenth Circuit never addressed the class action issue.

enormous procedural and administrative burdens concerning issues such as notice to class members. Specifically, by its terms, Rule 23.2 would require compliance with the notice provisions set forth in Rule 23(d) and (e). Rule 23(d) authorizes the court to:

> requir[e], for the protection of the members of the class of otherwise for the fair conduct of the action, that notice be given . . . to some or all of the members of any step in action, or of the proposed extent of any judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action.

Fed. R. Civ. P. 23(d)(2). If this case were transformed into a class action, this Court therefore would be required to determine whether notice of any one of a host of steps in the litigation should be given to class members in order to meet due process standards, and then to determine what form that notice should take. *See* 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1793, at 299-300 & nn. 17-18 (2d ed. 1986).[27]

Rule 23(e) imposes even more substantial burdens. Under this provision, notice of dismissal or settlement of a class action is mandatory:

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[27] There is a split of authority concerning whether at least some form of notice is required as a constitutional minimum in all cases. *See* 7B C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1793, at 299-300 & nn. 17-18 (2d ed. 1986) (citing cases).

> A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise *shall be given to all members of the class* in such manner as the court directs.

Fed. R. Civ. P. 23(e) (emphasis added). As the Ninth Circuit has noted, "[a]lthough the rule accords a wide discretion to the District Court as to the form and content of the notice, due process *requires its presence and constitutional adequacy.*" *Mendoza v. United States*, 623 F.2d 1338, 1350-51 (9th Cir. 1980) (emphasis added), *cert. denied*, 450 U.S. 912 (1981); *accord, Officers for Justice v. Civil Serv. Comm'n*, 688 F.2d 615, 624-25 (9th Cir. 1982), *cert. denied*, 459 U.S. 1217 (1983). Thus, if this case were converted into a class action, each of USAA's hundreds of thousands of members might have to receive some form of notice before the suit could be settled. The cost and inevitable delay involved in formulating and disseminating such notice may significantly impact the prospects of any voluntary resolution of this suit, and certainly would force the parties and the Court to devote time and energy to the resolution of ancillary issues.

Given the ready availability of an alternate, state court forum and the very early stage of this litigation, there is no need for this Court to engage in what the *Finkielstain* Court, in rejecting a similar request, labeled an "awkward procedural exercise." 758 F. Supp. at 932. Instead, this Court should grant USAA's motion to dismiss and let this litigation proceed in state court.

CONCLUSION

For the foregoing reasons, USAA's motion to dismiss for lack of subject matter jurisdiction should be granted, and Plaintiffs' request for sanctions should be denied.

Respectfully submitted,

DANIELS, BARATTA & FINE

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Dated: December 30, 1991

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and not a party to the within action; my business address is 3580 Wilshire Boulevard, Los Angeles, California.

On December 30, 1991, I served the foregoing document described as **DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS FOR**

LACK OF SUBJECT MATTER JURISDICTION AND IN OPPOSITION TO REQUEST FOR SANCTIONS on the interested parties in this action by placing a true copy thereof enclosed in a sealed envelope(s) addressed as follows:

William M. Shernoff
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

I delivered such envelope(s) by hand to the offices of the addressee(s).

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made. Executed on December 30, 1991, at Los Angeles, California.

Type or Print Name

/s/ Thomas Smith
Signature

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 WFN PLAINTIFFS' SUPPLEMENTAL REPLY MEMORANDUM OF POINTS AND AUTHORITIES RE: OPPOSITION TO MOTION TO DISMISS (Judge Wm. Fremming Nielsen)

1.

INTRODUCTION

UNITED SERVICES AUTOMOBILE ASSOCIATION (hereinafter "USAA") states that LAUGHLIN E. WATERS and VOULA D. WATERS (hereinafter the "WATERS")

appear to agree with it that this court lacks subject matter jurisdiction unless USAA is a corporation under Texas law and that sanctions cannot be awarded unless USAA acted improperly in this action. USAA is dead (sic)

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1.

INTRODUCTION

UNITED SERVICES AUTOMOBILE ASSOCIATION (hereinafter "USAA") states that LAUGHLIN E. WATERS

and VOULA D. WATERS (hereinafter the "WATERS") appear to agree with it that this court lacks subject matter jurisdiction unless USAA is a corporation under Texas law and that sanctions cannot be awarded unless USAA acted improperly in this action. USAA is dead wrong. USAA mischaracterizes the WATERS' position apparently in the hope of distracting this court from the WATERS' true positions and serious charges.

USAA's supplemental brief attempts to put the best face it can on its years of misconduct in manipulating the federal courts and litigants. The closest it comes to any remorse for causing untold hours, weeks, and months of wasted judicial resources is its half-hearted statement that it "acknowledges that its past record in this regard has been flawed." Incredibly, USAA is still tap-dancing in an effort to avoid being sanctioned for a pattern of serious misconduct.

So that USAA cannot misconstrue the WATERS' position concerning sanctions and jurisdiction, we will put forth our position in as crystal clear language as possible. We do not want the true perspective and importance of this issue lost in the technical arguments USAA throws at this court.

2.

THE SANCTIONS ISSUE IN PERSPECTIVE

USAA implies that it brought to the attention of this court its history of contradictory, and indeed fraudulent, jurisdictional statements over a period of years which resulted in massive waste and inconsistent decisions. It

claims it did this by simply citing *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), in its initial dismissal papers because "the issue of USAA's jurisdictional status and history of litigation in federal court" was discussed in *Tuck*. Nothing could be more misleading. USAA was not a volunteer in bringing its pattern of misconduct to any court's attention. In fact, USAA's years of misconduct would still be undetected by the *Tuck* court and *this* court had it not been for a massive investigation carried on by the attorneys handling the *Tuck* case and *this* case which revealed USAA's fraudulent activity. Amazingly, 172 cases of misconduct were unearthed. All of that work was painstakingly retrieved from 52 clerks of 52 federal district courts which were affected by the scheme. Voluminous records were searched and copied from district courts around the country. This investigation took over 100 hours of attorney and paralegal time to simply ferret out and gather the evidence of contradictory jurisdictional affidavits. That is how this scheme was brought to the attention of the federal judiciary. In no way, shape or form did USAA attempt to come forward or police itself until it was *caught* as a result of this investigation.

Even after being caught, USAA was not repentant. It fought the suggestion of sanctions by the Tenth Circuit Court of Appeals tooth and nail. Upon remand in *Tuck*, USAA fought vigorously the idea that the federal district court in *Tuck* could sanction it for its misconduct. It also fought vigorously the notion that the complaint in *Tuck* could be amended to preserve jurisdiction (just as it is doing in this case). When all of its efforts in *Tuck* failed, it then did the last thing it could possibly do to avoid having its misconduct sanctioned. After almost five years

of hard-fought litigation it threw over $1 million at the plaintiff's lawyers in the *Tuck* case to settle that case. In that way, it avoided the sanctions motion being ruled by the court in *Tuck*.

USAA erroneously asserts that the WATERS' position is that "sanctions cannot be awarded against USAA unless USAA acted improperly in this action." That is a mischaracterization of the WATERS' position. Attorneys and litigants have been sanctioned by the federal courts for as little as filing a misleading paper or wasting one day of court time. Compare that to what we have here. We have uncontroverted evidence of a *pattern* of conduct spanning *years* and involving multiple courts, litigants and parties. This is not an isolated matter. This is a major scheme that has just recently come to the surface.

Plaintiffs' position is simply this: When you have a pattern of misconduct that calls out for sanctions, it matters not whether the misconduct is discovered on the third day of the pattern, the third month of the pattern, or at the end of the third year of the pattern. Once the pattern of misconduct is brought to the attention of the federal judiciary, the judiciary must have the power to police such misconduct or the system will lack integrity and be susceptible to manipulation. In this case, USAA's pattern of misconduct has even continued a considerable time past the *Tuck* court directive. Plaintiffs have pointed out the Hawaii action wherein USAA took a $300,000 judgment, contrary to the instructions of the Tenth Circuit in *Tuck* and USAA has now revealed, at this late date, it has continued into 1991 with a federal district court case in North Dakota.

The sole excuse USAA offers is that it is a large insurer with over 3,000 outside counsel to manage its over 15,000 cases and that the handling of this bureaucratic task has caused these problems. It implies this all happened by inadvertence. This does not sound like a party who is truly sorry for causing so many problems with courts and litigants, all to USAA's advantage. Moreover, this claim of bureaucratic bungling is simply not credible and is yet another form of attempting to whitewash and minimize a most serious matter.

Let's face it, USAA knew it was a reciprocal inter-insurance exchange since it was formed. It knew the unique nature of this hybrid type of entity. It was the expert in reciprocal inter-insurance exchanges. Certainly, neither the federal courts, state courts, nor unsuspecting policyholder litigants knew, or even had a hint of, the fact that USAA could put two faces on its entity status in order to take advantage of the courts and its adversaries. It was USAA's responsibility *from the beginning* to take a correct and consistent position and to avoid taking unfair advantage of the courts and litigants. It did precisely the opposite. It took advantage at every turn and every opportunity, to the financial detriment of its adversaries and to its own financial advantage. It perpetuated this scheme for years (without any memos to outside counsel) until a couple of enterprising lawyers embarked upon a wide-scale investigation and uncovered USAA's sordid activities.

Even more telling, USAA's claims of bureaucratic snafu ring hollow in light of the opinion of Judge Mazzone issued in February, *1984*, in *Neil v. USAA*, United States District Court, District of Massachusetts,

Civil Action 83-2414-MA. (A true and correct copy is attached as Exhibit C.) In that declaratory relief action USAA filed a motion to dismiss after an adverse ruling. In that case, Judge Mazzone granted the motion, but noted:

> In [granting the dismissal], however, I must comment that it would behoove the Defendant to act properly and consistently in challenging diversity jurisdiction over it in Federal Court actions. In the past, the Defendant has both sued and allowed itself to be sued in Federal Court where jurisdiction was founded on diversity of citizenship, without challenging jurisdiction as it does in this present motion. [Citations omitted.] Selective challenges to jurisdiction bespeak a self-serving abuse of the Federal Court processes. Such tactics are particularly odious, since subject matter jurisdiction is not a matter that can be created by laches, waiver or estoppel. [Citations omitted.] Had the Defendant acted properly in challenging jurisdiction, substantial expense and effort to the Plaintiff, as well as to the Third-Party Defendants, would have been avoided."

USAA did not mention it, but the truth is, and USAA knows it, USAA was sternly warned by Judge Mazzone about its jurisdictional ploys and admonished to clean up its act *more than 7 years ago*. Yet it was not until *four years later*, in response to the *Tuck* court's admonishment, that USAA sent its first claim department bulletin in May, 1988. It is inconceivable that USAA and its litigation staff was so uninformed about what was going on in the cases involving it that it was unaware of or overlooked Judge Mazzone's warning. Despite USAA's contention of

bureaucratic mistake, the evidence is clear that USAA's jurisdictional manipulations were not mere error but were part of a comprehensive and systematic program that benefited USAA and cost its adversaries and the taxpayers dearly.

USAA now argues that there is some kind of statute of limitations for sanctioning its misconduct. This is an interesting theory, but it has no basis in logic or justice.

The common thread that runs through all of USAA's misconduct is its intentional nondisclosure of the unique status of a reciprocal exchange and the complete nondisclosure of its contradictory positions over the years. It goes without saying that this court would not be aware of the unique nature of a reciprocal inter-insurance exchange under Texas law or of USAA's past jurisdictional hopscotching if the WATERS had not brought this to the court's attention.

Although the nexus between USAA's pattern of misconduct over the years and this case is not overwhelming, the connection clearly exists. This case comes at the tail end of years of blatant misconduct where every instance of jurisdictional misstatements would in and of itself warrant sanctions but for the fact that those misdeeds were undetected at the time. Only USAA knew of its grand design of putting two faces on its entity status in order to take advantage of its adversaries and the courts. It never came forward in an honorable manner. USAA utterly failed to inform this court of the totality of a truly amazing situation.

This sanction motion comes at a time when the scheme is at an end due to being uncovered. USAA has

not yet been sanctioned one penny for its misdeeds. The government must be reimbursed for the tremendous waste of precious judicial time and resources. The WATERS, and their counsel, should be compensated for the investigation of the scheme and for bringing the wrongdoer to account. It goes without saying that the process by which we all litigate must be fair and free of abuse. Almost all federal judges are committed to this cardinal principle, especially in this time of heightened judicial activity. It is vitally important that abuses of the federal process be sanctioned. It is even more critical that major abuses that affect not only the courts, but the public at large, be dealt with severely.

If USAA's position is adopted, the federal courts are powerless to sanction such a continued pattern of serious misconduct as revealed in this case. Such a result would be untenable. Likewise, a result which would allow USAA to escape from compensating the U.S. government for massive judicial time wasted due to its own admitted "flawed record" would be untenable. If it was USAA's vast bureaucracy due to its largeness that caused all of these problems[1], then it should pay the price caused by its own design or failure to implement workable systems which resulted in its wanton disregard for the judicial processes. This is particularly true when the problems that have been caused have all shaken down to the financial advantage of USAA and to the financial disadvantage of its adversaries. One of the biggest victims of this scheme has been the over-burdened federal court who

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[1] As we have discussed above, the evidence is overwhelming that the scheme was done knowingly and by design.

unknowingly fell prey to countless days and weeks of totally wasted judicial resources. Instead of apologizing, after being caught, USAA arrogantly tells this Court, as it did the *Tuck* court, that the Court has no jurisdiction or power to sanction it for its misconduct. The WATERS are confident that this court will find the correct way to deal with this situation so that all concerned, litigants and the public, will have confidence in the integrity of the federal court system.

3.

USAA'S OPPOSITION TO SANCTIONS FAILS TO DEMONSTRATE EITHER THAT THE COURT IS WITHOUT INHERENT POWER TO SANCTION IN THIS CASE OR THAT SANCTIONS ARE UNDESERVED

USAA's opposition chooses to attack only factual bases for the sanction cases cited by plaintiffs without addressing the portent of those cases and the applicability of the philosophy expressed in those cases to the facts in this case. USAA attempts to focus this Court's attention on the trees in the hopes that the forest will be bypassed.

Obviously, the cases cited in plaintiffs' brief are *factually* dissimilar to the present case. As noted by plaintiffs at every turn, the facts in this case are, hopefully, unique. There is no other known case in which the manipulation of the entire federal court *system* has been so pervasive, blatant and extensive.

Thus, the various factual backgrounds in the cases cited by plaintiffs are far less important than the philosophy expressed in those cases and application of

the general rule of law as demonstrated by those cases. USAA cites not a single case which holds that this court does *not* have an inherent power to sanction in this situation. Moreover, the cases cited by plaintiff, while factually dissimilar, stand for the proposition that a party can be sanctioned in one case for conduct outside *that* case and for conduct before a *different* court. (See *In Re Itel Securities Litigation*, 791 F.2d 672 (9th Cir. 1986); *Freeze v. Griffith*, 849 F.2d 172 (5th Cir. 1988) and *Moody v. Miller*, 864 F.2d 1178 (5th Cir. 1989).)[2]

It is also important to note that USAA did not address or object to plaintiffs' citation of authority that this court may sanction USAA in this case even if the action is dismissed and relegated to state court. That can only be a concession by USAA that plaintiffs' position is correct.

The critical and essential consideration in regard to the sanctions issue is the acknowledgment that if this court cannot or does not sanction USAA, then no court can. USAA will have escaped unscathed.

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[2] Similarly, a California state court judge recently imposed sanctions on an insurer in one case for filing an action in another court. As discussed in the article, attached as *Exhibit A*, a Los Angeles Superior Court judge awarded the Department of Insurance sanctions of between $5000 and $10,000 against an insurer for the insurer's conduct in filing an action against the Department in San Francisco despite the Supreme Court's order that all such suits should be filed in Los Angeles.

4.

UNDER *CARDEN*, USAA MUST BE CONSIDERED A CORPORATION FOR DIVERSITY JURISDICTION PURPOSES

USAA cites the *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S.Ct. 1015 (1990) decision quite frequently, as if *Carden* stands for an endorsement of its years of misconduct. Noteworthy is the fact that the *Carden* case was not even mentioned by USAA in its original motion to dismiss. *Carden* does not stand for the proposition that USAA can manipulate and defraud courts and litigants to its own advantage and get away with it. Neither does *Carden* stand for the sweeping proposition for which USAA cites it.

It must first be acknowledged that the 5-4 decision in *Carden* is a narrow one. As noted by Justice Scalia in his opening paragraph:

> "The question presented in this case is whether, in a suit brought by a limited partnership, the citizenship of the limited partners must be taken into account to determine diversity of citizenship among the parties." (*Carden, supra*, 110 S.Ct. at 1016.)

Carden stands only for the narrow proposition that while a corporation can be considered a "citizen" of a state for purposes of diversity jurisdiction, other entities will be treated differently. But *Carden* does not address, and gives no guidance for the determination of, the question presented here: What *is* a "corporation" for diversity jurisdiction purposes?

There are many types of corporations. There are open and closed corporations, there are profit and nonprofit corporations, there are stock and mutual corporations as well as a host of other varieties of corporations. All have the singular benefit of no personal liability for the members that constitute the corporate body. Texas classifies a reciprocal inter-insurance exchange as a corporation and limits its members' liability (Texas Insurance Code, Article 19.03(3)) just as it does other corporations.

The only way to determine what is, or is not, a corporation is to look to state law. In this case, Texas law is clear. USAA is deemed a corporation by statute.

USAA talks out of both sides of its mouth. First it says that, under the diversity rules, only something which is *called* a corporation can be a corporation. Then, it argues that simply because USAA is *called* a corporation under the Texas statutes does not mean it *is* a corporation. Either *Carden* must be read to permit federal jurisdiction whenever an entity is *called* a corporation or *Carden* must be read to authorize an examination of whether the entity is, in substance and in fact, a corporate entity. Under either application of *Carden*, USAA loses.

Although USAA contends that the statute under which USAA is defined as a corporation is very narrow, that simply does not overcome the fact that USAA is expressly defined as a corporation. Additionally, the relevant statute deals with a critically important and integral issue in regard to corporate issue: individual liability of directors. The fact that an inter-insurance exchange is

granted the same immunity as are other types of corporations is a significant indication of its status as a type of corporation.

USAA's additional argument that because USAA is not, in every respect, treated like other corporations in regard to other regulatory provisions is of no avail. The fact is, there are numerous *types* of corporations in every state's law. For example, there are various types of both for-profit and non-profit corporations, each subject to differing regulations and requirements. Similarly, there are varying types of insurance corporations, some subject to certain regulatory provisions (e.g., health maintenance organizations) which others are not. The fact that there are species of corporations which are subject to different regulations does not overcome the ultimate fact that USAA is expressly defined under Texas statutes as a corporation. If it is a corporation for Texas, it is a corporation for this Court and USAA's semantic games cannot change that fact.

5.

THERE HAS BEEN NO JUSTIFIABLE BASIS PRESENTED BY USAA TO PRECLUDE USE OF THE CLASS ACTION DEVICE TO MAINTAIN JURISDICTION IN THIS CASE

First, a factual misrepresentation made by USAA must be disclosed. In attempting to distinguish *Oskoian v. Canuel*, 269 F.2d 311 (1st Cir. 1959), USAA contends that the class action was permitted only because Rhode Island law did not grant the entity jural status. That is false. In fact, Rhode Island *did* grant jural status to the entity involved. However, the plaintiff had failed to follow the

procedure necessary to prosecute the entity under that statute.

USAA acknowledges that in *Kerney v. Fort Griffin Fandangle Association, Inc.*, 624 F.2d 717 (5th Cir. 1980) the court authorized the use of the class action device because the relevant state law provided that "judgment rendered on an entity suit may be enforced against only the association's property and not that of the individual members." Yet USAA ignores that its members enjoy the same immunity. As provided in USAA's own Subscriber's Agreement (see Exhibit B), each member's liability is limited. Thus, as in *Kerney*, class action is the proper device to avoid the limitation of liability otherwise permitted.

Even if the special class action rule for unincorporated associations were not applicable to this case because USAA can be sued as an entity under California law, that does not preclude the maintenance of a class action under the general class action rule, Rule 23. Nothing in that rule restricts its application in this case. Moreover, an action under Rule 23(b) (1) has expressly been used in cases in which the defendant is an unincorporated association. (*Management Television Systems, Inc. v. National Football League*, 52 F.R.D. 162 (E.D. Pa 1971).) Permitting a class action in this case is only just and fair.

USAA's objections to the use of the class action device in this case are equally unavailing. USAA claims that use of the class action device in this case "would impose on the Court and the parties enormous procedural and administrative burdens." (USAA's Memorandum, page 31, lines 11-12.) Primarily, USAA contends

that the issue of notice would be unreasonably burdensome. However, USAA's own Subscriber's Agreement provides that notice to the attorney-in-fact is sufficient. Thus, notice to the attorney-in-fact should be adequate. Additionally, the fact that the subscriber's individual liability is limited justifies notice limited to the appointed attorney-in-fact. Finally, in a class action brought under Rule 23(b) (1), notice is not even mandatory. (*Hammond v. Powell*, 462 F.2d 1053, 1055 (4th Cir. 1972).) As such, USAA's objections to the class action device are without justification or merit.

6.

ANOTHER ALTERNATIVE FOR RETAINING JURISDICTION IS TO ALLOW PLAINTIFFS TO AMEND THE COMPLAINT TO SUBSTITUTE USAA'S ATTORNEY-IN-FACT AS THE SOLE DEFENDANT

As noted, USAA's Subscriber's Agreement (attached as Exhibit B) expressly provides that USAA's attorney-in-fact may represent the individual subscribers in court and may both sue and *defend on behalf of each subscriber*. This device could thus permit USAA to pursue litigation by naming its attorney-in-fact, a citizen of Texas, and invoking federal diversity jurisdiction in actions against parties who are not Texas citizens. (*Klamath-Lake Pharm. Ass'n v. Klamath Med. Services Bureau*, 701 F.2d 1276 (9th Cir. 1983) [assignee of a claim is real party in interest and may sue in his own name without joining the assignor].) Thus, USAA may continue to use this device to access the federal court system.

That same procedural device could be used to permit plaintiffs to sue USAA by suing its attorney-in-fact, a Texas citizen, as the sole defendant and representative of the subscribers. This would eliminate any possible objection to the class action device, would permit this court to maintain jurisdiction and would permit the parties to proceed to the substantive issues in this action.

7.

CONCLUSION

This case presents an exceptional sanctions issue. There are few, if any, reported appellate decisions involving a pattern of misconduct respecting jurisdictional issues which resulted in financial gain to the perpetrator and in a waste of judicial resources of major proportions. The consequence to the litigants involved undoubtedly involved millions of dollars.

Faced, for the first time, of possibly paying the price of such deception, USAA has not denied the evidence of its misconduct, nor has USAA denied the enormity of the results of its misdeeds. It simply asked this Court to excuse it because it is large and has so many lawyers and cases. Actually, this is a reason to impose sanctions rather than excuse them. USAA has been one of the prime beneficiaries of the federal court system. Any party who uses the court so frequently should bear the responsibility of using it correctly.

USAA's other response is even more alarming. It boldly and unabashedly tells this Court that USAA can waste judicial resources by way of a deceptive scheme

and this Court cannot do anything to rectify the situation, simply because the motion for sanctions is coming at a time when the pattern of misconduct is ending, and in a case where the misconduct is less serious than in previous cases involved in the scheme. That position simply defies logic and justice. Reduced to the bottom line, USAA argues that if you are a very large company and if the deception is so clever that it escapes detection, you are home free. As the WATERS have pointed out, we believe this Court has the inherent power to sanction USAA whether or not it retains jurisdiction.

We believe this Court should retain jurisdiction in this case because a reciprocal inter-insurance exchange is, under Texas law, classified as a corporation and, under *Carden*, is therefore a citizen of the state of Texas for jurisdictional purposes. Accordingly, this Court should look at USAA as a jural person and invoke diversity jurisdiction. This is particularly true because of the 1987 Amendments in the Texas law which deem a reciprocal inter-insurance exchange a corporation. *Baer* and *Tuck* notwithstanding, this is the first court that has been given an opportunity to fully explore the unique nature of a reciprocal inter-insurance exchange, under recent Texas law.

As one alternate way of retaining jurisdiction, this Court can allow plaintiffs to amend their complaint to assert a class action under either Rule 23.2 or 23(b) (1).

As a final, and perhaps most practicable alternative, plaintiffs can be permitted to amend their complaint to name Robert McDermott, the attorney-in-fact for every

USAA subscriber and a Texas citizen, as the sole defendant in this action.

Lastly, even if this Court does not retain jurisdiction, it has the power to sanction USAA for its years of misconduct and should definitely exercise that power in this case in order to validate the integrity of the judicial process.

Dated this 8th day of January, 1992 at Claremont, California.

Respectfully submitted,

SHERNOFF, BIDART & DARRAS

By: /s/ William M. Shernoff
WILLIAM M. SHERNOFF

Attorneys for Plaintiffs

EXHIBIT A

THE JOURNAL OF COMMERCE **Thursday, December 5, 1991**

Court Penalizes Insurer Over Venue Violation

By JERRY GOLDBERG
Journal of Commerce Special

LOS ANGELES – Los Angeles County Superior Court Judge Dzintra Janavs said Tuesday she will impose sanctions against Woodland Hills-based 20th Century Insurance Co. and Gary Fontana, its legal counsel.

Judge Janavs charged the insurer with "attempting to manipulate the judicial process" by filing a Proposition 103-related lawsuit in a San Francisco County Superior Court.

Among other things, the judge said she would issue an order requiring the company to compensate the Department of Insurance for $5,000 to $10,000.

Proposition 103 is the 1988 voter-approved measure calling for the election of state's insurance commissioner, prior approval of rate increases and a rollback of insurance rates.

Judge Janavs imposed the sanctions on the motion of California Insurance Commissioner John Garamendi. The two 20th Century companies were among 14 companies, representing more than half the California insurance market, who were ordered to refund $1.56 billion to 1989 customers by Mr. Garamendi on Nov. 13.

Judge Janavs said the San Francisco suit was in violation of an order by California Supreme Court Chief Justice Malcolm Lucas, which required all California Proposition 103 matters to be filed in Judge Janavs' court.

Judge Janavs ruled 20th Century's lawsuit should have been filed in Los Angeles, and ordered the case transferred to her court.

Justice Lucas' ruling occurred following a period when numerous Proposition 103 lawsuits were filed in San Francisco, Sacramento, San Jose, Los Angeles and San Diego.

Attorneys for Roxani Gillespie, the former insurance commissioner, complained at the time that defending

suits all over the state put excessive costs on the Department of Insurance.

Several California judges also complained that lawyers were attempting to "shop" for judges who would provide favorable rulings.

The suit was filed by 20th Century Insurance Co. and 21st Century Industries, subsidiaries of 20th Century Industries.

20th Century's San Francisco suit against the Insurance Department challenged the method used by Mr. Garamendi in deciding the insurer should return $106.5 million in premiums to customers.

The lawsuit contends the formula used by Mr. Garamendi did not reflect the true cost of insurance premiums to consumers.

It also charged the emergency regulations "essentially sidesteps the process that Prop. 103 called for in rate setting."

Mr. Garamendi said 20th Century had obtained an order from the San Francisco Court setting a hearing on its petition for Dec. 13, which was three days before the administrative hearing was scheduled.

Observers have been puzzled by Mr. Garamendi's rollback order since he issued statistics two weeks before that indicated 20th Century had the lowest premium rate of any personal line insurer doing business in any area of California.

The insurer has a 2.7% share of the California market.

EXHIBIT B

SUBSCRIBER'S AGREEMENT AND POWER OF ATTORNEY

The undersigned, hereafter known as the Subscriber, agrees with other subscribers at an Exchange known as the UNITED SERVICES AUTOMOBILE ASSOCIATION, hereinafter referred to as the Association, located at San Antonio, Texas, to exchange private contracts of indemnity. To that end, I hereby appoint the President of the Association and/or such person or persons as may be designated by the Board of Directors in accordance with Article VIII, Section 8 of the Bylaws, and licensed by the Commissioner of Insurance of the State of Texas, with full powers of substitution and revocation, and with authority to act jointly or severally, as my Attorney-in-Fact, in my name, place and stead, to represent me in the following matters:

1. To exchange with other subscribers at such Exchange, insurance coverages as now or hereafter authorized by the Board of Directors; to subscribe and deliver all proper contracts of insurance; to take any action in furtherance of the exchange of such contracts of insurance; to do and perform every other thing that I could do in respect to such contracts so exchanged, including the appearance – and defense in my name in actions and proceedings; and to manage and conduct the business, affairs and property of the Exchange under the supervision of the Board of Directors.

2. The powers hereby vested in my said attorney shall be exercised only in accord with the decisions of the Board of Directors of the Association, provided that the

said attorney may deputize such person or persons as may be appointed therefore by the Board of Directors of the Association to authenticate the policy contracts now applied for or these that I may hereafter apply for, and all papers pertaining thereto. It is understood that the subscribers reserve unto themselves the right to govern the Association according to the decision of a majority of subscribers present in person or by proxy at any meeting.

3. I adopt as a part of this agreement the Bylaws of the Exchange now or hereafter effective.

4. I agree that this Power of Attorney shall have application to all insurance applied for by me, including such modifications or changes in any of my insurance as may be made at my request, and the representations made by me in connection with each policy shall have the same force and effect as if contained in this instrument.

5. I agree that, no director of United Services Automobile Association ("USAA") shall be personally liable to USAA or its members for monetary damages for any act or omission in the director's capacity as a director occurring from and after the adoption hereof, except in the following instances: (i) for any breach of the director's duty of loyalty to USAA or its members; (ii) for any act or omission not in good faith or which involves intentional misconduct or knowing violation of their law; (iii) for any transaction from which the director received an improper benefit, whether or not the benefit resulted from action taken with the scope of the director's office; (iv) for any act or omission for which the liability of a director is expressly provided for by statute; or (v) for any act

related to an unlawful stock repurchase or payment of a dividend.

6. I agree further that this Power of Attorney shall be and become effective on the date hereof and shall remaining [sic] force and effect only so long as I have a contract of insurance with the Exchange. This agreement is strictly limited to the use and the purpose herein expressed and to no other purpose.

Executed this _____ day of _____

19___, at _____.

Membership No. _____ SIGN HERE _____
(Do not print-legal signature required)

EXHIBIT C

1ST CASE of Level 1 printed in FULL format. GARY NEIL, Plaintiff V. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant and Third-Party Plaintiff V. DEARBORN AUTO, INC., ET AL., Third-Party Defendants

Civil Action 83-2414-MA

UNITED STATES DISTRICT COURT DISTRICT OF MASSACHUSETTS

Slip Opinion

February 15, 1984

COUNSEL:

George f. [sic] gormley, [sic] esq., [sic] One Center Plaza, Boston, MA 02108, for Plaintiff

Gerald Blair, Avery, Dooley, Post & Avery, 141 Tremont St., Boston, Ma. 02111, FOR DEARBORN AUTO, Philip J. McCarthy, Esq., LAW OFFICES OF PHILIP J. MCCARTHY, One Liberty Square, Boston, Mass. 02109, FOR CREATIVE COACH WORKS, INC., John A. Maloney, Esq., LAW OFFICES OF LEONARD N. AUGELLO, 10 Post Office Square, Suite 1155, Boston, Mass. 02109, for Defendant

OPINIONBY: [sic] MAZZONE

OPINION:

MEMORANDUM AND ORDER

MAZZONE, D.J.

Again, this matter is before the Court, this time on the defendant's motion to dismiss for lack of jurisdiction over the subject matter. Fed.R.Civ.P. 12(b)(1). The factual background of the dispute is set out fully in my Memorandum and Order of September 30, 1983. The plaintiff, a citizen of Massachusetts, asserted jurisdiction founded on diversity of citizenship.28 U.S.C. § 1332. In its present motion, the defendant claims that its legal status for purposes of establishing diversity of citizenship is that of an inter-insurance exchange association, and not a corporation. As such, the defendant claims its citizenship is determined by that of each of its members. There being a common citizenship between the plaintiff and thousands of the defendant's other members, the defendant moves this Court to dismiss for lack of jurisdiction.

The defendant is a reciprocal inter-insurance exchange. As cogently established by the Second Circuit in Baer v. United Services Automobile Association, 503

F.2d 393 (2d Cir. 1974), the defendant is an unincorporated association formed under Texas law and can not be considered a "corporation" for purposes of established diversity of citizenship. Citing Rosendale v. Phillips, 87 F.2d 454 (2d Cir. 1937) (per curiam), the Second Circuit noted: "For the purpose of the determining whether diversity of citizenship exists, unincorporated associations have long been considered to be citizens of each and every state in which the association has members. Thus, if the unincorporated association party to a lawsuit has any member whose state citizenship coincides with the state citizenship of any of the opposing parties in the lawsuit, a federal district court has no diversity jurisdiction."

The Second Circuit also noted that under United Steelworkers v. R.H. Bouligny, Inc., 382 U.S. 145 (1965), the formal distinction between the insurance reciprocal and the insurance corporation is dispositive on the issue of whether the reciprocal should be considered a corporation for diversity purposes, irrespective of whether the distinction is, as a practical matter, an artificial or illogical one. 503 F.2d at 395. The Second Circuit further commented that any trend toward erosion of the rule creating multiple state citizenship for unincorporated associations seems to have been halted abruptly by Bouligny. The Supreme Court in Bouligny acknowledged the significant similarity between corporations and certain other types of associations, but was unwilling to tamper with the existing statutory rule of 28 U.S.C. § 1332(c), which by its express terms applies only to corporations: "We are of the view that these arguments, however appealing, are addressed to an inappropriate forum, and that pleas for

extension of the diversity jurisdiction to nitherto [sic] uncovered broad categories of litigants ought to be made to the Congress and not to the courts." 382 U.S. at 150-51.

In view of the clear pronouncement of the Supreme Court in Bouligny, and the Second Circuit's cogent application of the law to this particular defendant in Baer, this Court finds the defendant to be an unincorporated association for the purposes of establishing diversity of citizenship. I cannot be persuaded by the plaintiff's attempts to enlarge the scope of 28 U.S.C. § 1332(c) to consider the defendant a corporation for jurisdictional purposes. There being no evidence to dispute the defendant's averment that it has thousands of members residing in Massachusetts, this Court must find that there is no diversity of citizenship between the plaintiff and the defendant. Accordingly, the complaint against the defendant must be dismissed.

In so doing, however, I must comment that it would behoove the defendant to act promptly and consistently in challenging diversity jurisdiction over it in Federal court actions. In the past, the defendant has both sued and allowed itself to be sued in Federal Court where jurisdiction was founded on diversity of citizenship, without challenging jurisdiction as it does in this present motion. See Feliciano v. United Services Automobile Association, 646 F.2d 695 (1st Cir. 1981); United Services Automobile Association v. Glens Falls Insurance Company, 429 F.Supp. 101 (D.Conn. 1976); United Services Automobile Association v. Middleton, 77 F.R.D. 660 (N.D.Ga. 1978). Selective challenges to jurisdiction bespeak a self-serving abuse of the Federal court processes. Such tactics are particularly odious since subject

matter jurisidiction is not a matter that can be created by laches, waiver or estoppel. See Owen Equipment & Erection Co. v. Kroger, 437 U.S. 365, 377 n.21 (1978); Page v. Wright, 116 F.2d 449 (7th Cir. 1940). Had the defendant acted promptly in challenging jurisdiction, substantial expense and effort to the plaintiff, as well as to the third-party defendants, would have been avoided.

Finally, because the defendant/third-party plaintiff was not properly subject to this Court's jurisdiction, the defendant/third-party plaintiff's complaint must also be dismissed as having been brought without this Court's jurisdiction. Fed.R.Civ.P. 14(a).

SO ORDERED.

ORDER OF DISMISSAL

MAZZONE, D.J.

In accordance with the Court's memorandum and order dated February 15, 1984 allowing the defendant's motion to dismiss, it is hereby ORDERED that the above entitled action and third party action be and hereby is dismissed.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On JAN. 8 1992, I served the foregoing document described as:

PLAINTIFFS' SUPPLEMENTAL REPLY MEMORANDUM OF POINTS AND AUTHORITIES RE: OPPOSITION TO MOTION TO DISMISS

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
Daniels, Baratta & Fine
1801 Century Park East
Ninth Floor
Los Angeles, California
90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[COURTESY COPY FEDERAL EXPRESSED TO JUDGE WM. FREMMING NIELSEN]

[ ] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service

on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[X] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on JAN. 8 1992, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

EXHIBIT A

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, ALBANY-AMERICUS DIVISION

HENRY A. PRIDGEN, As Next Friend for HENRY A. PRIDGEN, III, A Minor, Plaintiff, vs. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	CIVIL ACTION NO. 84-247-ALB-AMER DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S MOTION TO REMAND

I.

FACTUAL BACKGROUND

U.S.A.A., Defendant in the above action, is a reciprocal interinsurance exchange, domiciled in the State of Texas, and licensed under Chapter 19 of the Texas Insurance Code. U.S.A.A. is licensed to do business as a property/casualty insurer in all fifty states, as well as certain foreign locations, and has over 1.2 million policyholders. (Affidavit of John L. Swyers.)

U.S.A.A. is managed by a Board of Directors, elected by the policyholders at an annual meeting. Operational management is by a President, who is also the Attorney-in-Fact, and several Vice Presidents. The Association's headquarters are located in San Antonio, Texas in its own building which houses approximately 5,800 employees. Approximately 800 employees are located in field service offices in several other states.

U.S.A.A. is the parent company in an insurance holding company system regulated under Article 21.49-1 of the Texas Insurance Code. U.S.A.A. owns all the stock of several subsidiary Texas insurance and financial service corporations.

Upon being served by Plaintiff in Crisp County Superior Court for alleged failure to timely pay $47,500.00 in Personal Injury Protection benefits, U.S.A.A. removed this action to this Court pursuant to 28 U.S.C. § 1332. Plaintiff has filed his Motion to Remand.

II.

ARGUMENT AND CITATION OF AUTHORITY

(A)

For purpose of 28 U.S.C. § 1332, U.S.A.A. should be considered a citizen of Texas.

The U.S. Supreme Court in *Puerto Rico v. Russell & Co.*, 28 U.S. 476, 77 L.Ed. 903 (1933) the Court held in determining whether diversity of citizenship exists so as to give a Federal Court jurisdiction of a suit against a sociedad en comondita (sic) organized under Puerto Rican Commercial Code, the citizenship of its members is immaterial.

The Court said:

> "The petitioner argues, nevertheless, that the suit was not removable because of citizenship for the reason that the sociedad is a juridical entity under Puerto Rican law and, as in the case of a corporation, its domicil [sic] rather

than that of its members determines citizenship for purposes of federal jurisdiction."

"Therefore, to call the sociedad en comandita a limited partnership in the common law sense, as the respondents and others have done, is to invoke a false analogy. In the law of its creation the sociedad is consistently regarded as a juridical person. It may contract, own property and transact business, sue and be sued in its own name and right."

"Its members are not thought to have a sufficient personal interest in a suit brought against the entity to entitle them to intervene as parties defendant. See People v. Zayas, 29 P.R.R. 423, 430. It is created by articles of association filed as public records. Code of Commerce, § 95, 98; compare Civil Code § 1558, 1560. Where the articles so provide, the sociedad endures for a period prescribed by them regardless of the death of withdrawal of individual members. Civil Code § 1591, 1596, 1598, Code of Commerce § 141. Powers or management may be vested in managers designated by the articles from among the members whose participation is unlimited and they alone may perform acts legally binding on the sociedad. Civil Code § 1583, 1589; Code of Commerce § 102, 106, 125. Its members are not primarily liable for its acts and debts (Code of Commerce § 156), and its creditors are preferred with respect to its assets and property over the creditors of individual members, although the latter may reach the interests of the individual members in the common capital. Civil Code § 1590; see *Quintana Bros. & Co. v. S. Ramirez & Co.*, 22 P.R.R. 707, 716. Although the members whose participation is

unlimited are made contingently liable for the debts of the sociedad in the event that its assets are insufficient to satisfy them (Code of Commerce, § 125, 156; see *M. Lamadrid & Co. v. Torrens, M. & Co.*, 28 P.R.R. 824), this liability is of no more consequence for present purposes than that imposed on corporate stockholders by the statutes of some state." *Puerto Rico v. Russell & Co.*, 288 U.S. 476, 77 L. Ed. 903 (1933).

Further, *Moore's Federal Practice*, Volume 3, shows:

to unincorporated associations. The issue was thus framed: Did Congress intend, following Judge Learned Hand's underlying 'entity' theory, that unincorporated associations would not also have residence wherever, by analogy to corporations, they could be found to be doing business? Or on the other hand, did Congress, by its silence, merely adopt that narrow ruling in the *Sperry Products* case that unincorporated associations were residents of their 'principal palce [sic]' of business and stop with that? In a variety of contexts, some lower courts ruled that unincorporated associations were, analogous to corporations, residents wherever doing business, but others ruled they were residents only of their principal place of business.

In 1967, the Supreme Court ruled on the question in *Denver & Rio Grande Western R.R. Co. v. Brotherhood of Railroad Trainmen*. Adopting the theory that Congress had left the matter open for judicial development, the Court held that for venue purposes, unincorporated associations are to be assimilated to corporations and are to be considered residents wherever they are doing business. As an alternative holding, the Court found the 1966 amdndment [sic] of 28 U.S.C.

§ 1391(b), providing that suits can also be brought in the district 'in which the claim arose,' was applicable to the pending suit."

In *American Federation of Musicians v. Stein*, 213 F. 2d 679 (6th Cir.) the Court held:

"The description of the attributes of the United Mine Workers of America, as related by Chief Justice Taft, may, upon the trial of the instant case, be found equally applicable to the American Federation of Musicians. Whether in the light of People of Puerto Rico v. Russell & Co., supra, such national unions, with unity of action and power centered in their governing executive bodies, may be considered by the Supreme Court to be juridical persons equivalent to corporations for purposes of citizenship in cases in which jurisdiction is founded upon diversity of citizenship, is a question which, as far as this proceeding is concerned, is properly, in the first instance, subject to the consideration of the district court, where its determination, by virtue of the order of the court granting the preliminary injunction, abides the hearing.

Perhaps the most recent case in which the question has been determined is in *Van Sant v. American Express Co.*, 3 Cir., 169 F.ed (sic) 355, 372, where a New York joint stock association was treated as a corporation for purposes of diversity and, hence, as a citizen of New York. In its opinion, the court observed (in a footnote) that the old rule 'that generally speaking an unincorporated association has no citizenship for diversity purposes is itself beginning to show signs of being outmoded.' "

> However, the rule that the citizenship of unincorporated associations generally is that of its members, seems to be losing its vitality. 'There is some evidence . . . that the present federal rule is undergoing change, for the Supreme Court has treated a sociedad en comandita organized under Puerto Rico law as a citizen and resident of Puerto Rico for purposes of federal jurisdiction.' *Moore's Federal Practice*, Volume 3, page 1413 (2d Edition). In the case above referred to, *People of Puerto Rico v. Russell & Co.*, 288 U.S. 476, 53 S.Ct. 447, 448, 77 L. Ed. 903, the court held that a sociedad en comandita under the laws of Puerto Rico was not a limited partnership in the common-law sense, but a juridical person, with a personality like that of a corporation, and that it had the status of a corporation for purposes of federal jurisdiction, that is, citizenship."

The citizenship of a business trust is determined by the citizenship of the trustees, rather than that of the individual beneficiaries. *Navarro Savings Assoc. v. Lee*, U.S. 458 (1980).

U.S.A.A. is a "reciprocal inter-insurahce [sic] exchange" organized under the laws of the State of Texas. Under Texas Law, such exchanges are similar, if not identical to, corporations. In Wilson v. Marshall, 218 S.W. 2d 345, 346, (1949) the Court of Civil Appeals of Texas described them as follows:

> "The Subscribers at a reciprocal exchange are not only policyholders thereat and as such entitled to the protection afforded by the policies and required to pay the premiums stipulated in the policies; but they also own the

> insurance business just as stockholders own their corporation. They are the owners of their insurance exchange, and as such are entitled to reap the profits accruing from the operation of their insurance business and are also required to pay their pro rata part of the losses and expenses incurred at the exchange. It is their liability to pay their pro rata part of the losses and expenses that take the place of the capital structure of the exchange. When called upon to pay an assessment for his pro rata part of the losses, the subscriber at the exchange stands in the position of a stockholder in a stock insurance company whose capital structure has become depleted and who is required to pay a certain amount on each share of stock he owns into the coffers of the company to remove the deficit."

Additionally, indicia of the defendant's corporate status may be found in the fact that U.S.A.A. is the parent company in an insurance holding company system regulated under Article 21.49-1 of the Texas Insurance Code. U.S.A.A. owns all the stock of several subsidiary Texas insurance and financial service corporations. Also, like a corporation, U.S.A.A. is controlled by a Board of Directors, has officers, and is governed by a set of by-laws.

An examination of the Texas statutes pertaining to reciprocal inter-insurance exchanges indicates that such exchanges may be corporations. In fact, such an examination reveals that the term "reciprocal exchange" is less a description of the type of business organization than it is a description of the type of insurance arrangement. See Article 19.01 of the Texas Code of Insurance, a copy of which is attached to Mr. Swyers' affidavit.

Moreover, reciprocal insurance exchanges are subject virtually to the same regulatory scheme as corporations. See Article 19 of the Texas Insurance Code.

Additionally, United Services Automobile Association, has registered as a member of a holding company system under the Article 21.49-1 of the Texas Insurance Code, a statute generally regarded as governing corporate activity. See *Labowitz L.J. Corporations*, 26 Southwest Law Journal 87, 90, wherein said statute is discussed under the annual survey of corporate law. U.S.A.A.'s position in the holding system is as the parent or holding company, not simply as a small subsidiary, in the United Services Automobile Association group. Because U.S.A.A. is the parent company of a number of subsidiary corporations, and because, regardless of which subsidiary one is in fact dealing with, all communications are directed to the same corporate headquarters in San Antonio, Texas, one can conclude that the parent and the subsidiaries are really one and the same and should be treated as one corporation.

Clearly, U.S.A.A. is a corporate entity in everything but name. For this reason, Defendant urges this Court to treat it as such for purposes of determining its citizenship, as the Supreme Court did in *Puerto Rico vs. Russell & Company*, 288 U.S. 476 (1933). In that case the Court held that because a "sociedad decomandita" so closely resembled a corporation it should be treated as one for purposes of determining its citizenship. I so finding, the Court held that because the "socieded" is treated as a "judicial person" under the laws of Puerto Rico, "we saw no adequate reason in holding that the sociedad has a different status for purposes of federal jurisdiction than a

corporation organized under that law." So too, because U.S.A.A. appears to act and be treated as a "person distinct from its members", under the law of Texas, it should not be treated here any differently than a Texas corporation.

Plaintiff has relied in its Brief upon *Baer vs. United Services Automobile Association* 503 F.2d 393 (2d Cir. 1974), in which the Court of Appeals for the Second Circuit find sua sports, and parties were unable to bring most of the facts relied upon herein to the Court's attention. The decision appeared to rest exclusively upon the Court's reading of Articles 2 and (illegible) of the Texas Insurance Code, and the fact that U.S.A.A. restricts the availability of its insurance to servicemen. The Court apparently relied upon no Texas case law to reach its conclusion that a reciprocal exchange is not similar to a corporation. As mentioned above, *Wilson*, supra, holds that the two are almost identical. Nor did the Court consider U.S.A.A.'s status as a holding company, under Article 21.49-1 of the Texas Insurance Code. Lastly, *Baer* was decided in 1974, and, while it may have been a smaller operation then, which more closely resembled a voluntary association, today it is clearly, a huge corporate organization.

In *United Services Automobile Association vs. Glens Falls Insurance Company*, 429 F. Supp. 101, 105 (D. Conn. 1976) the Court described United Services Automobile Association as a "Texas corporation", and found diversity jurisdiction on that basis. That was a case in the Second Circuit decided two years after the *Baer* decision.

It is interesting to note that:

> "Business entities that are not incorporated pursuant to state law may qualify for treatment as corporations for federal tax purposes. These organizations called associations, must have more corporate characteristics than partnership or trust characteristics. The Treasury Regulations identify certain characteristics that establish 'corporateness' against which unincorporated business entities are measured. If the organization has more corporate characteristics than not, it will be identified as a corporation. These characteristics are: '(i) Associates, (ii) an objective to carry on business and divide the gains therefrom, (iii) continuity of life, (iv) centralization of management, (v) liability for corporate debts limited to corporate property, and (vi) free transferability of interests.'" *3A Cavitch, Business Organizations,* § 64.02(3).

Under 28 U.S.C. 1332, a corporation is a citizen of both the place of its incorporation and its principal place of business. United Services Automobile Association is, therefore, a citizen of Texas since it was organized under Texas law, and as a holding company, its principal place of business is considered to be the location of its "nerve center", i.e. "the location from which the corporation's officers direct, control, and coordinate all activities without regard to location, in the furtherance of the corporation objective" *Lugo Vina vs. Pueblo Intern Insurance,* 574 F.2d 41, 43, (1st Cir. 1979). Since all officer operate out of San Antonio, Texas, that is the "nerve center" and principal place of business of United Services Automobile Association.

For the foregoing reasons, the Defendant respectfully urges this Court to deny the Plaintiff's Motion to Remand.

(B)

Plaintiff contends this is a "direct" action against an insurance company and therefore is not removable pursuant to a proviso added to 28 U.S.C. § 1332: "Any direct action against the insuror [sic] of a policy or contract of liability insurance . . . such insuror shall be deemed a citizen of the State by which the insuror has been incorporated and of the State where it has its principal place of business."

It is basic hornbook law that removal jurisdiction is keyed to original diversity jurisdiction under 28 U.S.A. § 1332. "As under the predecessor statute, removal under section 1441 is keyed generally to original jurisdiction of the district of courts." 7B J. Moore, *Moore's Federal Practice*, at page J.C.-699.

Georgia's no-fault law in [sic] not a direct action statute. A direct action statute is one such as exists in Louisiana which permits the injured party to sue the tortfeasor's insurance company directly as opposed to having to sue the tortfeasor. (illegible) no stretch of the imagination is Georgia's no-fault law a direct action statute and no decision of the Georgia Courts has ever intimated as such. The Georgia no-fault law does not give an injured party any right to sue the liability carrier for the alleged tortfeasor. Instead, Georgia no-fault law merely provides a method for which an insured may collect benefits from its own insurance carrier and has nothing

to do with the alleged tortfeasor. A number of the cases cited by the Plaintiff at page 5 of its Brief are not in point with the instant case. For example, the *Hernandez* decision is one involving a workers' compensation claim. Workers' compensation claims are specifical [sic] excluded from removability pursuant to 28 U.S.C. § 1445(c). The *make-over* in this one *makeover* case was one involving a declarate judgment action by an insuror over a coverage issue and the court held that such actions do not come within the proviso in 28 U.S.C. § 1445(c). Finally, the *Azalea Meats, Inc.* case was one wherein a Georgia plaintiff (livestock seller) sued a number of parties when he had delivered some livestock and had not received payment. The party defendants included a number of Georgia parties, including the Commissioner of Agriculture and the insuror for the Commissioner of Agriculture. In an effort to cure the obvious defect in diversity jurisdiction, the plaintiff dismissed all Georgia defendants except the insuror for the Commissioner of Agriculture. The action was dismissed due to lack of jurisdiction and at pages 510 and 511, the Court emphasises [sic] that had it not done so, one could circumvent the purpose of proviso in subsection 'c' merely by filing suit against some resident defendants enjoining in a diverse insurance carrier and then later dismissing all but the insurance carrier. The factual situation presented by *Azalea Meats, Inc.* is not present in the instant case.

It cannot be overemphasized that in the instant case we do not have the situation where a plaintiff is suing the insurance carrier for an alleged tortfeasor and just has failed to join with the insured. In the instant case, the Plaintiff himself is the insured. Finally, contrary to the

assertions in Plaintiff rief, [sic] there is no "trend", especially to this circuit, to make the no-fault law into a direct action statute. The entire theory behind a direct action statute is that a thrid party who has been injured by an alleged tortfeasor, may sue the insuror for the alleged tortfeasor without joining the alleged tortfeasor (insured).

III.

CONCLUSION

We submit that the well reasoned decisions embraced in this Brief support the removal of this action.

Respectfully submitted,

BURT, BURT & DAVIS, P.A.

BY: /s/ Hilliard P. Burt
HILLIARD P. BURT,
Attorney for Defendant.

Post Office Box 525
Albany, Georgia 31703
(912) 432-6205

and

BY: /s/ C. Nathan Davis
C. NATHAN DAVIS,
Attorney for Defendant.

Post Office Box 525
Albany, Georgia 31703
(912) 432-6205

STATE OF GEORGIA,
COUNTY OF DOUGHERTY.

CERTIFICATE OF SERVICE

This will certify I have this date served upon opposing counsel of record, JOHN C. PRIDGEN, P. O. Box 397, Vienna, Georgia 31092, a copy of the above and foregoing "Defendant's Brief In Opposition To Plaintiff's Motion To Remand" by depositing said copy in the United States Mail, addressed as written above, with sufficient postage thereon to insure proper delivery of same.

This the 29th day of November, 1984.

BURT, BURT & DAVIS, P.A.

BY: /s/ Hilliard P. Burt
HILLIARD P. BURT,
Attorney for Defendant.

Post Office Box 525
Albany, Georgia 31703
(912) 432-6205

EXHIBIT A

AFFIDAVIT

STATE OF TEXAS :

COUNTY OF BEXAR :

Before me, the undersigned authority, on this day personally appeared JOHN L. SWYERS, known to me, and being first duly sworn, desposes and states the following, to wit:

I am JOHN L. SWYERS, of lawful age, residing in the State of Texas. I am employed by United Services Automobile Association as Vice President-Associate General Counsel/Assistant Secretary.

In the above-stated capacity, I affirm that United Services Automobile Association (USAA) is a reciprocal interinsurance exchange, domiciled in Texas, and licensed under chapter 19 of the Texas Insurance Code. USAA is licensed to do business as a property/casualty insurer in all fifty states, as well as certain foreign locations, and has over 1.2 million policyholders.

As a reciprocal, USAA is owned by its policyholders who, through their premiums, contribute the necessary capital. Profits are returned to the policy holders through policy dividends and allocations to Subscriber's Savings Accounts (said allocated funds are paid to the policyholder whenever he or she terminates all policies). Operationally, USAA can be said to function much like a mutual insurer.

USAA is managed by a Board of Directors, elected by the policyholders at an annual meeting. Operational management is by a President, who is also the Attorney-in-Fact, and several Vice Presidents. The Association's headquarters are located in San Antonio, Texas in its own building which houses approximately 5800 employees. Approximately 800 employees are located in field service offices in several other states.

USAA is the parent company in an insurance holding company system regulated under Article 21.49-1 of the

Texas Insurance Code. USAA owns all the stock of several subsidiary Texas insurance and financial service corporations.

Attached hereto are copies of Chapter 19 and Article 21.49-1 of the Texas Insurance Code. Also attached is a pamphlet entitled "USAA Bylaws" which I certify to be a true and correct copy of the Associaiton's [sic] current Bylaws.

The undersigned is competent to make this Affidavit and understands it will be used as evidence in the case of HENRY A. PRIDGEN, As Next Friend for HENRY A. PRIDGEN, III, A Minor vs. U.S.A.A.; U.S. District Court No. 84-247-ALB-AMER, Middle District of Georgia.

/s/ John L. Swyers
JOHN L. SWYERS

Subscribed and sworn to before me this 27th day of November 1984.

/s/ Loretta C. Lanicek
LORETTA C. LANICEK
Notary Public
Bexar County, Texas

My commission expires 11/30/88

EXHIBIT B

AFFIDAVIT OF BILL SOUZA

BILL SOUZA, being first duly sworn on oath, deposes and says that:

1. I am the Assistant Vice President and Claims Manager of Hawaiian Insurance and Guaranty Company, Ltd., a Hawaii Corporation.

2. I hereby certify that we have paid United Services Automobile Association $391,343.50, pursuant to a Judgment and an Order rendered in CA No. 88-2941, CV-84-0300-ACK and CV-87-0483-ACK (consolidated).

FURTHER AFFIANT SAYETH NAUGHT

/s/ Bill Souza
BILL SOUZA

subscribed and sworn before me this
7th day of November, 1991.

/s/ illegible (Seal)
Notary Public, State of Hawaii

My commission expires: 12-9-91

Hawaiian Insurance Group
[HEI]

[LOGO]

1001 Bishop Street
Bishop Square •
Pacific Tower
Honolulu, HI 96813-3429
Phone (808) 536-2777

Mailing Address:
Post Office Box 2255
Honolulu, HI 96804-2255

FAX (808) 547-8398
Cable Hawguar/
Telex 671-1835
Answer Back HIC-UW

November 25, 1991

Mr. William M. Shernoff
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

Re: **Waters v. USAA**

Dear Mr. Shernoff:

In our situation, ***USAA v. HIG***, we issued three(3) payments to USA.

The first was on 12/19/89, for $353,417.88. The second was on 3/8/90, for $37,549.20. The final was on 4/13/90, for $376.42.

Thank you.

Very truly yours,

/s/ Bill Souza
Bill Souza
Assistant Vice President

FWS/ei

cc: Walt Davis
Law Offices of Ian L. Mattoch
Suite 1835, Grosvenor Center
737 Bishop Street
Honolulu, HI 96813

EXHIBIT C

LOCAL NEWS/WEATHER/EDITORIAL PAGES

METRO

FRIDAY
NOVEMBER 8, 1991 *Los Angeles Times*

Insurance Firm Flip-Flopped in Claims Cases

■ **Legal system:** USAA has history of arguing on both sides of the fence about courts' jurisdiction regarding non-payment claims. Sanctions of $1.7 million sought.

By HENRY WEINSTEIN
TIMES STAFF WRITER

United Services Automobile Assn., one of the nation's largest insurance companies, has for years argued on both sides of the fence about whether suits against it for non-payment of claims should be argued in state or federal court.

In more than 170 instances throughout the United States, the Texas-based company has argued to both federal and state judges that it was being sued in the wrong

court, failing to reveal that it had argued the other way in other cases, frequently simultaneously.

Now, in a case involving a federal judge in Los Angeles whose home was severely damaged in a fire, this chameleon-like behavior is being challenged as fraudulent ducking of legitimate claims.

U.S. District Court Judge Laughlin E. Waters is asking that USAA pay him and his wife sanctions of $1.7 million for engaging "in a massive, widespread and fraudulent scheme to mislead the federal courts and to manipulate federal court jurisdiction to suit its own purposes."

Court records show that during the past two decades, USAA, attempting to avoid paying claims, has repeatedly given different descriptions of what kind of company it is. These contentions were a critical element as lawyers for the company argued that cases should be heard in federal or state court depending on what appeared to serve its best interests.

The sanctions issue, scheduled for a hearing today, stems from a suit filed in federal court here last July by Waters, a federal judge since 1976, and his wife, Voula. The Waters allege that USAA acted in bad faith, stonewalling them when they filed an insurance claim after their Hancock Park home burned last December.

Their suit states that there is federal jurisdiction because they are California residents and USAA is a Texas corporation. USAA has moved to have the suit dismissed. The company claims that it is an unincorporated association with 280,000 members in California – its

policyholders – and therefore the case does not belong in federal court.

But the Waters, represented by Claremont attorney William M. Shernoff, responded by citing 172 instances where USAA has taken contradictory positions on its corporate status.

"USAA's pattern of deliberate abuse of the federal courts is probably the most widespread, nefarious scheme perpetrated on the federal courts in the history of the federal judiciary." Shernoff asserted in a brief "USAA argues it is a corporation or corporate like entity when it suits USAA to be in federal court, and argues it is an unincorporated association when it suits USAA to get out of federal court."

The company, in court documents, acknowledged that its attorneys have made conflicting statements.

But Timothy B. Dyk, a Washington lawyer, denied that USAA had acted in bad faith, saying the company had thousands of cases in litigation and that it was difficult to keep track of what contentions were being made in each of them.

A brief filed for USAA by Century City lawyer Paul R. Fine contends that the company has done nothing wrong in the Waters case and that the court has no power to sanction USAA for anything that happened in a prior case.

However, several lawyers and law professors said they were deeply troubled by what USAA has done in these cases.

"You can't claim you're a fish in one court and a fowl in the other," said attorney Edward F. Silva, who had a suit against USAA in Philadelphia. "It's not honest to do that."

"This company is the 'Zelig' of federal jurisdiction," said New York University law professor Stephen Gillers, referring to the Woody Allen movie about a man who constantly changes his persona to suit his purposes.

Gillers, who specializes in legal ethics, reviewed the documents in the Waters case and said they show that the federal court system can be duped. "The company has manipulated its status so that no rule applies to it," he said.

Court records show that USAA's general counsel filed an affidavit in a Georgia federal court in 1984 supporting the company's bid to move a case from state court to federal court on jurisdictional grounds. But he filed another affidavit in a Washington case in 1987 supporting USAA's contention that there was no jurisdiction to sue it in federal court.

University of San Francisco law professor Jeffrey S. Brand, who specializes in federal litigation and *

He said this is the sort of situation that has prompted calls for reform of the nation's civil justice system.

"Conduct like this should be of great concern to everyone because it makes it impossible" for the legal system to function properly, Brand said.

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Brand and Gillers said they were not sure if the Waters are entitled to sanctions, but said some action was warranted based on USAA's pattern of conduct. Both said some individuals and companies who had opposed USAA in earlier cases might be entitled to have those cases reopened.

The issue is under consideration by U.S. District Judge Wm. Fremming Nielsen of Spokane, Wash. He was brought in to hear the suit when all the federal judges in Los Angeles had to disqualify themselves because of their relationship to Waters.

Founded in 1922, USAA is the nation's eighth-largest insurance company, with $5.6 billion in assets, an operating surplus of $2.7 billion and profits of $65 million last year, according to Best's Insurance Guide. The company insures only current and former members of the armed services and their families.

Last June, California Insurance Commissioner John Garamendi praised USAA for having the best record of consumer service on auto claims. He also said the agency did not find a single justified complaint against the company by a homeowner.

But Waters, 77, and his wife say they have had a very disturbing experience with USAA.

Last December, the couple's large, elaborately decorated residence on June Street suffered severe fire damage. A company chosen by the Waters made an estimate for repair work of $442, 663, court documents say.

During the next several months, repair companies chosen by USAA submitted considerably lower estimates,

starting at $116,587 and * restore the Waters' home, attorney Shernoff alleged in the suit.

When the two sides could not agree, Waters said he and his wife decided to sue.

Shernoff said the Waters' lives have been thrown into turmoil by USAA's intransigence, forcing them to rent a house for many months and leading to multiple hospitalizations of Mrs. Waters "for anxiety, stress and high blood pressure."

The issue of jurisdiction in USAA claims first arose in 1974. While defending a lawsuit in New York, USAA contended that it was not a corporation, but an "inter-insurance exchange," all of whose policyholders are members of the exchange. A federal appeals court ruled in USAA's favor, saying it could not be sued in a New York federal court, or a federal court in any other state where it has members. USAA is licensed to sell insurance in every state.

However, in the years since then USAA has continually flip-flopped on whether it should be in federal court, sometimes changing its mind in the same case.

For example, in 1984 it took sharply diverging positions in federal courts in Massachusetts and Georgia.

Gary Neil filed suit in federal court in Boston after USAA failed to pay a claim on his auto insurance. USAA waited several months, then challenged jurisdiction. Although U.S. District Judge A. David Mazzone agreed

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with USAA and dismissed the suit citing the 1974 Baer case, he chastised the * behoove the defendant to act promptly and consistently in challenging diversity jurisdiction over it in federal court actions," Judge Mazzone said in his February, 1984 decision. "In the past, the defendant has both sued and allowed itself to be sued in federal court where jurisdiction was founded on diversity of citizenship, without challenging jurisdiction as it does in this case."

"Selective challenges to jurisdiction bespeak a self-serving abuse of the federal court processes." Mazzone said.

Neil's lawyer, George F. Gormley, refiled the suit in state court and seven years later collected a $32,000 judgment against two other two defendants. A jury found USAA not liable. Gormley said he believed that USAA wanted the case out of federal court because Mazzone had made preliminary rulings favorable to Neil.

Just months after Mazzone's 1984 decision, USAA reversed direction in Georgia. Henry A. Pridgen had filed suit in Crisp County Superior Court alleging that the company had failed to pay him $47,500 in personal injury protection benefits. This time, USAA successfully got the case switched to federal court, arguing that Pridgen was a Georgian and USAA was "a citizen of Texas."

USAA lawyers contended that the 1974 Baer decision was outmoded.

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"While it [USAA] may have been a smaller operation then, which more closely resembled a voluntary association today it is * llard P. Burt. To support this contention in November, 1984, John L. Swyers, USAA's associate general counsel, signed an affidavit describing the company's status, which was attached to Burt's brief.

Attorney John C. Pridgen, who represented his cousin Henry in the case, said he believed USAA wanted to get out of the state court located in his cousin's hometown. He said the fact that USAA was able to invoke federal jurisdiction in this case while escaping it in others showed that persons suing the company weren't able to litigate on "a level playing field." The case was settled on the eve of trial.

The next major decision on USAA's status began in Tulsa, Okla., federal court in 1983. Leroy and Dorothy Tuck sued USAA, contending the company acted in bad faith when it failed to pay the couple's claims after their son Johnny, a Marine Corps helicopter pilot, was killed by a drunk driver. The federal jury awarded the Tucks $900,000, which a judge reduced to $675,000. On appeal, citing the Baer opinion, USAA asserted that the court had no jurisdiction.

But while the Tuck appeal was pending, USAA filed suits in federal courts in Birmingham, Ala., Philadelphia and San Diego Claiming it was a Texas corporation.

Changing direction again, the company filed a motion seeking to dismiss a case in Seattle federal court, buttressed by an affidavit from general counsel Swyers.

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In October, 1988, the 10th Circuit Court of Appeals ruled in USAA's favor in the Tuck case.

However, the appeals court noted that USAA had taken contradictory positions on jurisdiction. The judges said of USAA: "We expect to make similar motions" to get out of all its pending federal cases.

Four months later, Patrick E. Carr, the Tucks' lawyer, asked the 10th Circuit to impose sanctions on USAA because of its allegedly * sanctions motion asserting that despite the 10th Circuit's 1988 decision, USAA continued to appear in federal court in 22 cases. The Tucks received a $1.4 million settlement.

Additionally, attorney Dyk submitted a report to the court for USAA describing steps the company "has taken and is taking to insure that USAA . . . will not be a party to actions in federal courts based on diversity of citizenship."

The report said that USAA first advised all regional claims officials in May, 1988, to seek dismissal of all federal suits against it. The report said the company sent out another bulletin in December, 1988, advising its officials to "stay out of federal court."

Nonetheless, the company acknowledged, some federal cases remained open. One of those suits was filed in 1984 in Honolulu federal court by USAA against another insurance company. USAA prevailed at trial and on appeal.

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In successfully arguing the appeal in May, 1989, seven months after the 10th Circuit decision, USAA once again described itself as a Texas corporation. In December, 1989, USAA collected a $353,417 judgment from Hawaiian Insurance Group in the Honolulu case.

Bill Souza, Hawaiian Insurance Group vice president, said in an interview this week that he had just learned about the federal appeals court decision directing USAA to get out of federal court.

"I'm kind of floored by this," he said. "I feel these people did not act in good faith." Souza said he has asked the group's attorney to file papers seeking to have the judgment set aside and for USAA to be sanctioned.

USAA officials in San Antonio declined to answer questions about the controversy. Company spokesman Hal Schade issued a brief statement, saying USAA was following constitutional guidelines on *

'USAA's pattern of deliberate abuse of the federal courts is probably the most widespread, nefarious scheme perpetrated on the federal courts in the history of the federal judiciary.'

WILLIAM M. SHERNOFF
Attorney

---

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On DEC. 9 1991, I served the foregoing document described as:

PLAINTIFFS' SUPPLEMENTAL BRIEFING AS ORDERED BY COURT IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF REQUEST FOR SANCTIONS

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy

thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
Daniels, Baratta & Fine
1801 Century Park East
Ninth Floor
Los Angeles, California
90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[ ] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[X] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on DEC. 9 1991, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

PAUL R. FINE, ESQ.
DANIELS, BARATTA & FINE
1801 Century Park East
Los Angeles, California 90067
(213) 556-7900

OF COUNSEL:

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Washington, D.C. 20005
(202) 879-3939

Attorneys for Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. CV-91-3615-WFN NOTICE OF MOTION AND MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292 (Filed Feb. 11, 1992) (Judge Wm. Fremming Nielson) Date: March 9, 1992 Time: 10:00 a.m. Courtroom: To Be Announced Trial Date: September 14, 1992

TO PLAINTIFFS LAUGHLIN E. WATERS AND VOULA D. WATERS AND TO THEIR ATTORNEYS OF RECORD HEREIN:

PLEASE TAKE NOTICE that on March 9, 1992, at 10:00 a.m., or as soon as the matter may be heard by Order of the Court, defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), will move the Court to rule that the Order filed on February 7, 1992 (the "Order"), which denied USAA's motion to dismiss for lack of subject matter jurisdiction, should be certified for immediate appeal pursuant to 28 U.S.C. § 1292(b).

This motion will be made on the grounds that the Order involves a controlling question of law as to which there is a substantial ground for difference of opinion, and that an immediate appeal from the Order may materially advance the ultimate termination of this litigation. In particular, the motion will argue that the Order obviously presents a controlling question of law since it presents the threshold question of whether this Court has subject matter jurisdiction. The motion will further argue that the Order's ruling that USAA should be deemed to be a corporation for purposes of diversity jurisdiction conflicts with the Supreme Court's instructions in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), for determining jurisdictional status, and that the Order expressly conflicts with decisions of the Second and Tenth Circuits which have held that USAA is deemed to be a citizen of every state in which it has members.

This motion will be based on this notice and the Memorandum in Support of Certification Pursuant to 28

U.S.C. § 1292(b), which is attached hereto and submitted herewith.

Dated: February 11, 1992

DANIELS, BARATTA & FINE

By: /s/ Paul R. Fine by DM
Paul R. Fine

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE ASSOCIATION

Of Counsel:

JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005
(202) 879-3939

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____

_____ and know its contents

[X] CHECK APPLICABLE PARAGRAPH

[ ] I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am [ ] an Officer [ ] a partner _____ [ ]

a _____ of _____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. [ ] I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. [ ] The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am one of the attorneys for _____ , a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19 _____, at _____, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

PROOF OF SERVICE
1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles , State of California.

I am over the age of 18 and not a party to the within action; my business address is: 555 West 5th Street, Suite 4600, Los Angeles, California 90013

On 2/11/, 19 92. I served the foregoing document described as Notice of Motion And Motion For Certification Pursuant to 28 U.S.C. Section 1292

_____ on the interested parties in this action

[ ] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

[X] by placing [ ] the original [x] a true copy thereof enclosed in sealed envelopes addressed as follows:

Frank M. Darras, Esq.
William M. Shernoff, Esq.
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

[X] BY MAIL

[ ] *I deposited such envelope in the mail at

_____, California.

The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing.

Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postag meter

date is more than one day after date of deposit for mailing in affidavit.

Executed on _____ , 19 _____, at

_____, California.

[ ] **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, 19 _____, at

_____, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Martha Espelage
Type or Print Name

/s/ Martha Espelage
Signature

PAUL R. FINE, ESQ.
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OF COUNSEL:

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Attorneys for Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. CV-91-3615-WFN MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292 (Filed Feb. 11, 1992) (Judge Wm. Fremming Nielson) Date: March 9, 1992 Time: 10:00 a.m. Courtroom: To Be Announced Trial Date: September 14, 1992

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Attorneys for Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 WFN MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR CERTIFICATION PURSUANT TO 28 U.S.C. § 1292 (Judge Wm. Fremming Nielson) Trial Date: September __, 1992

INTRODUCTION

The February 7, 1992 Order (the "Order") entered by this Court denied a motion to dismiss for lack of subject matter jurisdiction and holds that this Court has jurisdiction because Defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), should be treated as a Texas corporation for diversity purposes. In doing so, USAA believes that the Order conflicts with the Supreme Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), which held that the citizenship of an artificial entity other than a corporation should be measured by the citizenship of all of the entity's members. In addition, the Order concededly (Order at 5) creates a direct conflict with decisions by the Second and Tenth Circuits, both of which have held that USAA should be treated as an unincorporated association and that, since USAA has members in each state, it therefore cannot participate in

federal diversity litigation. Since subject matter jurisdiction cannot be waived, the Order raises the prospect that the parties and the Court will go through an entire trial of this action only to have the result discarded due to a subsequent holding that there was no subject matter jurisdiction. Moreover, as a practical matter, the conflicts created by the Order place USAA in the untenable position of being unable to determine whether it can properly litigate in federal diversity cases. In these circumstances, this Court should certify the Order for immediate appeal under 28 U.S.C. § 1292(b) (1988).

ARGUMENT

Section 1292(b) allows for the immediate appeal of an order if the district court certifies that it:

> involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

28 U.S.C. § 1292(b).[1] Thus, as the Ninth Circuit held in *In re Cement Antitrust Litigation*, 673 F.2d 1020, 1026 (9th Cir. 1982), *aff'd for lack of quorum*, 459 U.S. 1190 (1983), there are three requirements that must be met before § 1292(b) certification is appropriate: "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal

---

[1] Under § 1292(b), the district court's certification may be added to an existing order at any time through an amendment. *See* Fed. R. App. P. 5(a).

may materially advance the ultimate termination of the litigation." The Order satisfies each requirement. Indeed, it is the quintessential case for certification under § 1292(b).

I. Since The Order Resolves A Threshold Jurisdictional Issue, It Clearly Presents A Controlling Question Of Law

Section 1292(b)'s first requirement – that the order involve a "controlling question of law" – is easily satisfied here. "[A]ll that must be shown in order for a question to be 'controlling' is that resolution of the issue on appeal could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litigation*, 673 F.2d at 1026. The issue resolved by the Order is whether this Court has subject matter jurisdiction over the lawsuit. There can hardly be an issue that more "materially" impacts the outcome of the litigation.

The Order itself notes that it was resolving "[t]he *key* issue [of] whether or not USAA is to be treated as a corporate or non-corporate entity." Order at 2 (emphasis added). Under *Carden*, this question of corporate or non-corporate characterization controls USAA's citizenship for diversity purposes. Corporate entities are deemed to be citizens only of their states of incorporation or of their principal places of business. 28 U.S.C. § 1332(c)(1) (1988). But *Carden* held that, "to determine, for diversity purposes, the citizenship of [a non-corporate] entity, the court [must] consult the citizenship of . . . all of the entity's members." 494 U.S. at 195. Since, as the Order

recognized (Order at 1), some USAA members are citizens of the same state as the Plaintiffs, the requisite complete diversity exists only if USAA is deemed to be corporate entity. Thus, in a very real sense, the Order involves a controlling question of law: if the Order's conclusion that USAA is a corporate entity is correct, then the suit can go forward in federal court; but if USAA must be treated as a non-corporate entity, then the entire case must be dismissed for lack of subject matter jurisdiction.

The courts and commentators consistently recognize that this type of jurisdictional determination is a "controlling question" for purposes of § 1292(b). As the Ninth Circuit explained in *United States v. Woodbury*, 263 F.2d 784, 787 (9th Cir. 1959) (emphasis added; footnotes omitted):

> Section 1292(b) was intended primarily as a means of expediting litigation by permitting appellate consideration during the early stages of litigation of legal questions which, if decided in favor of the appellant, would end the lawsuit. Examples of such questions are *those relating to jurisdiction* or a statute of limitations which the district court has decided in a manner which keeps the litigation alive but which, if answered differently on appeal, would terminate the case.

Accord, In re Western Liquid Asphalt Cases, 487 F.2d 202, 203-04 (9th Cir. 1973) (§ 1292(b) review of a district court order denying motion to dismiss for lack of subject matter jurisdiction), *rev'd on other grounds*, 419 U.S. 186 (1974). Other courts also have expressly recognized that the issue of subject matter jurisdiction is a controlling question and

thus is an appropriate candidate for § 1292(b) review. *See, e.g., Miche v. Great Lakes Steel Div.*, 495 F.2d 213, 214-15 (6th Cir.) (§ 1292(b) review of whether diversity jurisdiction was present), *cert. denied*, 419 U.S. 997 (1974); *Leaseco Data Processing Equip. Corp. v. Maxwell*, 468 F.2d 1326, 1330 (2d Cir. 1972) (§ 1292(b) review of issues of personal and subject matter jurisdiction).[2]

Indeed, the Sixth Circuit recently accepted for § 1292(b) review a case that is strikingly similar tc this one. In *SHR Limited Partnership v. Braun*, 888 F.2d 455 (6th Cir. 1989), the court considered a diversity suit brought by two West Virginia limited partnerships against several Michigan citizens. Many of the limited partners in the partnerships also were Michigan residents and, accordingly, the defendants moved to dismiss for lack of complete diversity. *Id.* at 456. The district court denied the motion to dismiss because it concluded that the limited partners need not be considered to determine the citizenship of the partnerships. *Id.* The defendants then moved for certification, and the district court granted the motion, finding that the jurisdictional issue "concerned a controlling issue of law upon which there is substantial ground for differences of opinion." *Id.* The Sixth Circuit

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[2] *See also* 9 J. Moore, B. Ward & J. Lucas, *Moore's Federal Practice* ¶ 110.22[2], at 268-70 & n.13 (2d ed. 1991) (noting that "a question as to jurisdiction of the subject matter" is a familiar example[] of controlling questions"); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3930, at 158 (1977) (noting that "an initial question of jurisdiction" is an appropriate candidate for interlocutory review).

agreed, and accepted the appeal.[3] In the face of *SHR Limited Partnership v. Braun* and these other authorities, there can be no doubt that § 1292(b)'s first requirement is met here.

II. There Is Substantial Ground For Difference Of Opinion As To The Jurisdictional Issue Resolved In The Order

Likewise, it is plain that § 1292(b)'s second requirement is easily satisfied in this case. Specifically, certification is appropriate here because the legal issue resolved in the Order plainly is one "as to which there is substantial ground for difference of opinion." 28 U.S.C. § 1292(b).

A. There Is Substantial Reason To Believe That The Order Conflicts With The Supreme Court's Decision In Carden v. Arkoma Associates

In *Carden*, the Court held that the citizenship of the "wide assortment of artificial entities" that "[t]he 50 States have created, and will continue to create" must be measured by the citizenship of each of their members:

> In sum, we reject the contention that to determine, for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members. . . . [Rather,] a suit by or against the entity depends on the citizenship of all the members.

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[3] The Sixth Circuit went on to reverse, holding that the citizenship of the limited partnerships must be determined by reference to all of their members. 888 F.2d at 457-59.

Id. at 195-97 (quotation omitted). USAA believes that the Order's conclusion that USAA's citizenship is *not* that of its individual members conflicts directly with *Carden*.

The Order's sole basis for distinguishing *Carden* and holding that USAA should be deemed to be a corporation for diversity purposes is *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). *Russell* involved the issue of whether a case involving a sociedad en comandita, an entity organized under the civil code of Puerto Rico, could be removed from a Puerto Rican court to federal court. *Id.* at 477-78. Removal was permitted only if the sociedad was deemed to be a "citizen" not just of Puerto Rico, but of every state in which it had a member. *Id.* at 478-79. The Court held that the sociedad's citizenship should not be measured by that of its members; instead, the Court held that the sociedad should be viewed as a "juridical person" and thus as a citizen of Puerto Rico, under whose laws it was organized. *Id.* at 481.

The Order determines that because *Carden* did not overrule *Russell*, the functional analysis undertaken in *Russell* is appropriately applied to USAA. Thus, the Order holds that, because the characteristics of the sociedad en comandita are similar to certain characteristics of a reciprocal insurance exchange under Texas law, USAA should be treated as a "juridical person" just as the sociedad was in *Russell*. *See* Order at 4. USAA believes that this approach is flawed in three respects.

First, *Carden* made it clear that the functional approach to jurisdictional status used in *Russell* did not apply in other settings. USAA therefore believes that the

entire premise of the Order's analysis is flawed. Specifically, the Order compares various characteristics that the sociedad en comandita and a Texas reciprocal exchange share, and concludes that these similarities compel the conclusion that the two entities must be given the same jurisdictional treatment. *See* Order at 4. *Carden* expressly rejected not only this general approach to determining jurisdictional status, but this particular reading of *Russell* as well. In *Carden*, the Court addressed the respondent's argument that "th[e] language, and the outcome of [*Russell*] 'reflec[t] the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship.' " 494 U.S. at 190. In other words, the respondent in *Carden* argued for precisely the same reading of *Russell* adopted by the Order. The *Carden* Court, however, quickly rejected such an analysis, ruling "that th[is] approach . . . was proposed and specifically rejected in [*United Steelworkers v.*] *Bouligny*[, 382 U.S. 145 (1965)]." 494 U.S. at 190. Thus, *Carden* and *Bouligny* completely foreclose the method of analysis, and the reading of *Russell*, adopted in the Order.[4]

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[4] It also should be noted that the same features that the Order points to in aligning a reciprocal exchange with the sociedad en comandita apply to limited partnerships and other types of unincorporated associations. Indeed, the dissent in *Carden* – which gave *Russell* the same type of broad reading as the Order – complained that a limited partnership was a "virtually identical stateside counterpart" to the sociedad en comandita. 494 U.S. at 209 (O'Connor, J., dissenting).

Second, while the Order recognizes that "*Bouligny* appeared to undercut *Russell*," it incorrectly reads *Carden* as "mak[ing] it clear that *Russell* still has precedential value and must be considered in any analysis of an association as a juridical person." *See* Order at 5. USAA believes that *Carden* does nothing of the sort. Instead, *Carden* completely adopts *Bouligny*'s reading of *Russell*, and expressly endorses *Bouligny*'s decision not to "apply [] *Russell* beyond its facts." 494 U.S. at 190 & n.2. Thus, *Bouligny* limited – and *Carden* eviscerated – the validity of *Russell* as a guide in determining the jurisdictional status of any entity other than the Puerto Rican sociedad en comandita. *See Id.* at 190.

Third, in all events, the Order fails to recognize that both the Supreme Court and the Ninth Circuit have limited *Russell*'s applicability to civil law entities. In other words, as the Supreme Court made clear in *Bouligny*, *Russell* addresses only the narrow problem of "fitting an exotic creation of the civil law . . . into a federal scheme which knew it not." 382 U.S. at 151. This civil law/common law distinction originates in *Russell* itself, where the Court drew a careful line between entities created under a civil law system, and entities organized within a common law structure. For example, the *Russell* Court emphasized the distinctive civil law system under which the sociedad en comandita was created, noting that while "[t]he tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships . . . [, t]he tradition of the civil law, as expressed in the Code of Puerto Rico, is otherwise." 288 U.S. at 480. The distinction was confirmed in

Bouligny, 382 U.S. at 151, and strongly reiterated in *Carden*. In fact, the *Carden* court took pains to note that *Russell*, while not expressly overruled, had been limited to its facts. 494 U.S. at 190 & n.2. Finally, the Ninth Circuit has expressly relied on the civil law/common law distinction in analyzing *Russell*'s reach. In *Cohen v. Rosenfeld*, 733 F.2d 625, 628-29 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984), the court noted the need to "distinguish[] 'the tradition of the common law' . . . from the more diverse tradition of the civil law as expressed in the Code of Puerto Rico," and then went on to apply *Russell* to the civil law entity at issue in that case (an anstalt organized under the laws of Liechtenstein, a civil law country). USAA thus believes that the Order plainly errs in applying *Russell* outside the civil law setting.[5]

B. In Light Of The Conceded Conflict Between The Order And The Decisions Of The Second And Tenth Circuits, There Plainly Is Substantial Ground For Difference Of Opinion

In addition to conflicting with *Carden*'s holding concerning the proper method for determining jurisdictional status, the Order concededly creates an express conflict with the Second and Tenth Circuits. As the Order itself notes (Order at 5), both *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974), and *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988),

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[5] It should be noted in this regard that a reciprocal insurance exchange is hardly an "exotic" creature of Texas law. Many states authorize this type of entity, including California. *See* Calif. Ins. Code §§ 1280-1530 (West 1972 & Supp. 1992).

cert. denied, 489 U.S. 1080 (1989), have expressly considered USAA's jurisdictional status, and in both cases the courts held that USAA's citizenship must be determined by reference to all of its members. The courts have recognized that the existence of this type of conflict obviously means that there is "substantial grounds for difference of opinion." For example, the court in *SHR Limited Partnership v. Braun*, 888 F.2d at 456-57, granted § 1292(b) review in precisely this situation – there, as here, the court of appeals had yet to rule on the diversity jurisdiction issue that had led to "[a] split of authority." *See also Powell v. National Football League*, 711 F.Supp. 959, 961 (D.Minn.), *rev'd on other grounds*, 888 F.2d 559 (8th Cir. 1989) (citing conflicting decisions in finding that "[t]here is a substantial ground for difference of opinion"); *Kirchen v. Guaranty Nat'l Ins. Co.*, 422 F. Supp. 58, 61 (E.D. Wis. 1976) (noting existence of conflicting decisions would satisfy "substantial ground for difference of opinion" requirement).[6]

In sum, the Order plainly satisfies § 1292(b)'s second requirement. It simultaneously gives *Russell* a broad reading, thus creating a novel issue of law warranting § 1292(b) review, *see Klinghoffer v. S.N.C. Achille Lauro*, 921 F.2d 21, 25 (2d Cir. 1990), and creates a conflict with other decisions, thus evidencing the difference of opinion required for § 1292(b) review, *see SHR Limited Partnership v. Braun*, 888 F.2d at 456-57.

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[6] *Cf. Chalfin v. Beverly Enterprises, Inc.*, 745 F.Supp. 1117, 1122 (E.D. Pa. 1990) (noting, in denying request for § 1292(b) certification, that district court's decision agreed with only court of appeals decision on point).

III. Resolution Of The Jurisdictional Issue Through An Immediate Appeal Would Materially Advance The Ultimate Termination Of This Litigation

Section 1292(b)'s third requirement also is satisfied; resolution of the jurisdictional issue at this point would materially advance the ultimate termination of this litigation. As noted above, resolution of USAA's jurisdictional status controls whether this suit can proceed in federal court. USAA submits that there is a substantial likelihood that the Ninth Circuit will adhere to the reading of *Russell* it adopted in *Cohen v. Rosenfeld*, 733 F.2d at 628-30, and thus decline to accept the broader approach taken in the Order. In addition, USAA submits that the Ninth Circuit likely will follow the lead of the Second and Tenth Circuits, and that it therefore will reverse the Order's conclusion that USAA should be considered to be a corporation for diversity purposes. Thus, there is, at minimum, a substantial possibility that this case ultimately will be dismissed for lack of subject matter jurisdiction. Obtaining that ruling now from the Ninth Circuit obviously will "materially advance the ultimate termination of the litigation."

Moreover, it is important to recognize that the conflicting legal standards created by the Order place USAA in an untenable position. The Tenth Circuit has instructed USAA "to make . . . motions [to dismiss] in all pending diversity litigation." *Tuck v. USAA*, 859 F.2d at 845 n.3. The Order makes it impossible for USAA to follow this direction, and makes it difficult for USAA to know even how to characterize itself when faced with a diversity suit. Thus, USAA is compelled to seek to resolve this conflict, and the jurisdictional issue therefore eventually

must be addressed by the Ninth Circuit. Immediate appellate consideration of the issue will prevent substantial disorder and confusion, thereby preventing delay not only in this proceeding, but in all federal court proceedings in which USAA is named as a party. Certification therefore should be granted. *See* 16 C.Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3930, at 163 & n.21.

Finally, the proceedings in this case are at their very outset. There has been no discovery, and the only legal arguments addressed by the parties have focused on the threshold jurisdictional issues. Thus, the parties must proceed with full discovery, brief and argue any legal issues, and prepare for a trial on the merits, and the Court must address the substantive issues in the case and preside over any trial. There are no special reasons for pressing on with these steps while the serious jurisdictional uncertainty remains unresolved,[7] and accordingly, there is a substantial potential savings involved in resolving the jurisdictional issue now, rather than after the parties and the court have been burdened with full discovery and a trial. These considerations indicate an interlocutory appeal will "materially advance" the progress of this litigation. *See* 16 C.Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure* § 3930, at 163-68.

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[7] In fact, USAA has filed a separate motion for a stay of further proceedings in this case pending resolution of this motion to certify and the subsequent § 1292(b) appeal or if certification not granted, pending resolution of USAA's petition for a writ of mandamus.

In addition, the parties already have reviewed the jurisdictional issues in lengthy briefs to this Court, and the certified appeal thus could proceed with unusual dispatch. Specifically, to prevent any undue delay of the proceedings in this case, USAA will commit to filing its brief on the merits of the § 1292(b) appeal within the same 10-day period that the statute allows for the filing of the petition for leave to appeal from this Court's certification order. *See* 28 U.S.C. § 1292. USAA also will seek expedited briefing – and propose a 15-day period for Plaintiffs' brief and a 5-day period for USAA's reply brief – and expedited argument from the Ninth Circuit. In these circumstances allowing an immediate appeal of the jurisdictional issues resolved by the Order should cause no significant delay and should materially advance the termination of this suit.

CONCLUSION

For the foregoing reasons, USAA's motion for certification pursuant to 28 U.S.C. § 1292(b) should be granted, and this Court should amend the February 7, 1992 Order to include the recitations called for by § 1292(b).

Respectfully submitted,

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Dated: February 11, 1992

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____

_____ and know its contents

[X] CHECK APPLICABLE PARAGRAPH

[ ] I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am [ ] an Officer [ ] a partner _____ [ ]

a _____ of _____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. [ ] I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. [ ] The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am one of the attorneys for _____ , a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19 _____, at _____, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

_____ _____

Type or Print Name Signature

PROOF OF SERVICE
1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles , State of California.

I am over the age of 18 and not a party to the within action; my business address is: 555 West 5th Street, Suite 4600, Los Angeles, California 90013

On 2/11/ , 19 92 , I served the foregoing document described as Memorandum Of Points And Authorities In Support Of Defendant's Motion For Certification Pursuant To 28 U.S.C. Section 1292

on the interested parties in this action

[ ] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

[X] by placing [ ] the original [ ] a true copy thereof enclosed in sealed envelopes addressed as follows:

Frank M. Darras, Esq.
William M. Shernoff, Esq.
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

[X] BY MAIL

[ ] *I deposited such envelope in the mail at _____, California. The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing.

Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on 2/11, , 19 92 , at

Los Angeles , California.

[ ] **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

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_____, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Martha Espelage	/s/ Martha Espelage
Type or Print Name	Signature

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case NO. CV-91-3615-WFN MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANT'S MOTION FOR A STAY OF PROCEEDINGS PENDING REVIEW (Filed Feb. 11, 1992) (Judge Wm. Fremming Nielson) Date: March 9, 1992 Time: 10:00 a.m. Courtroom: To Be Announced Trial Date: September 14, 1992

INTRODUCTION

On February 7, 1992, this Court entered an Order denying defendant UNITED SERVICES AUTOMOBILE ASSOCIATION's ("USAA") motion to dismiss this case for lack of subject matter jurisdiction. USAA has filed, contemporaneously with this motion for a stay, a motion to certify the February 7, 1992 Order (the "Order") for immediate appeal pursuant to 28 U.S.C. § 1292(b) (1988). If that motion is not granted, USAA plans to file a petition for review in the form of a writ of mandamus.[1]

Since what is involved here is the threshold question of subject matter jurisdiction, further proceedings in this case should be stayed until such time as the Court of Appeals had considered jurisdictional issue. Such a stay will further the "just, speedy, and inexpensive determination of [this] action" (Fed. R. Civ. P. 1) by preventing the parties and Court from being subjected to the undue burden and expense of discovery and other proceedings in a case that may soon be determined to fall outside the Court's subject matter jurisdiction. In addition, because the Order places USAA in the untenable position of being unable even to characterize its correct jurisdictional status, USAA also requests a stay of the proceedings in this case should the Court not grant the motion to certify, in order to permit USAA to file, and the Court of Appeals to consider, a petition for mandamus.

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[1] USAA believes that, if the motion to certify is not granted, review may properly be had by way of a petition for mandamus. *See, e.g., Christensen v. United States District Court*, 844 F.2d 694, 696-97 (9th Cir. 1988).

ARGUMENT

Further Proceedings In This Case Should Be Stayed Until The Ninth Circuit Has Had An Opportunity To Review The Threshold Issue Of Subject Matter Jurisdiction

Section 1292(b) recognizes that a stay of proceedings pending resolution of a certified appeal may be appropriate. *See* 28 U.S.C. @ § 1292(b). Likewise, Rule 26(c) of the Federal Rules of Civil Procedure provides that all discovery may be stayed in order to avoid "undue burden or expense." Since the issue that USAA seeks to present through the certified appeal is a threshold question of subject matter jurisdiction, and since the short stay necessary here will cause Plaintiffs no substantial harm, this plainly is an appropriate case for such a stay.

First, the courts have regularly granted stays pending resolution of a § 1292(b) appeal. *See, e.g., Larraburu Bros., Inc. v. Royal Indem. Co.*, 604 F.2d 1208, 1210 (9th Cir. 1979); *Bigelow v. Hawaiian Airlines, Inc.*, 696 F. Supp. 1356, 1360 (D. Haw. 1987); *Rauch v. United Instruments, Inc.*, 405 F. Supp. 442, 447 (E.D. Pa. 1975), *rev'd on other grounds*, 548 F.2d 452 (3d Cir. 1976); *O'Brien v. Avco Corp.*, 309 F. Supp. 703, 705 (S.D.N.Y. 1969). Such a stay is particularly appropriate "when, as here, the determination of [the] preliminary question may dispose of the entire suit." *O'Brien v. Avco Corp.*, 309 F. Supp. at 705. The Order resolves the threshold question of whether this Court has subject matter jurisdiction over the action. But since it is well established that "the parties cannot by consent, waiver or estoppel obtain federal subject matter jurisdiction," *Sullivan v. First Affiliated Sec., Inc.*, 813 F.2d 1368, 1374 (9th Cir.), *cert. denied*, 484 U.S. 850 (1987), the Order does not

end the matter; the Ninth Circuit necessarily will consider the question and if it finds that jurisdiction is lacking it must order that the case be dismissed. Thus, by definition, determination of the jurisdictional issue "may dispose of the entire suit." *O'Brien v. Avco Corp.*, 309 F. Supp. at 705.

Second, a stay is particularly appropriate here because allowing discovery or other proceedings would lead to "undue burden or expense." Fed. R. Civ. P. 26(c). The future proceedings in this case will not involve the jurisdictional issue, but will center on the Plaintiffs' motion for sanctions and on the Plaintiffs' underlying allegations that USAA handled their insurance claim in bad faith. Should the Ninth Circuit ultimately reject this Court's conclusion that USAA should be treated as a corporation for diversity purposes, all of the parties' and the Court's efforts will be wasted, since the case then would be dismissed for lack of subject matter jurisdiction. USAA submits that there is a substantial likelihood of just such a result. USAA believes that the Order's analysis of, and conclusions about, USAA's jurisdictional status conflicts with the Supreme Court's decision in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), and with the Second and Tenth Circuit's decisions in *Baer v. USAA*, 503 F.2d 393 (2d Cir. 1974), and *Tuck v. USAA*, 859 F.2d 842 (10th Cir. 1988), *cert. denied*, 489 U.S 1080 (1989). Accordingly, there is a strong basis to believe that the Ninth Circuit will conclude that there is no subject matter jurisdiction and order that the case be dismissed. Allowing discovery and other proceedings to go forward in these circumstances would impose an undue burden and expense, and fly in the face of the federal courts' established policy to

defer or limit discovery until such a potentially dispositive preliminary issue has been resolved. *See, e.g., Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124 (5th Cir. 1976); *Brennan v. Local Union No. 639, Int'l Brotherhood of Teamsters*, 494 F.2d 1092 (D.C. Cir. 1974); *Taylor v. Breed*, 58 F.R.D. 101 (N.D. Cal. 1973); *Kelleher v. Omark Indus., Inc.*, 19 Fed. R. Serv. 2d 725 (D. Mass. 1975). In short, a stay is necessary to serve the basic goal of "secur[ing] the just, speedy, and inexpensive determination of [this] action." Fed. R. Civ. P. 1.

Third, in the circumstances of this case, entry of a stay will not unduly harm the Plaintiffs. A stay "can in no way prejudice plaintiff[s] on the interlocutory appeal," *O'Brien v. Avco Corp.*, 309 F. Supp. at 705, since the issues to be addressed in the future proceedings in this case will in no way illuminate the jurisdictional issues presented by the Order. Nor will a stay impose any undue burdens on the Plaintiffs. The underlying issue in this litigation is whether USAA acted in bad faith in processing Plaintiffs' claim for losses caused by a fire in their home.[2] Recovery of damages for the alleged bad faith is the only issue in the case; there is no dispute concerning coverage. In fact, USAA already has agreed to pay for the reconstruction and repair of the damaged portions of the Plaintiffs' home, and that work is almost complete.

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[2] USAA will supply an affidavit to support the factual allegations in this paragraph. However, due to USAA's desire to file this motion as expeditiously as possible, it was not administratively feasible to submit an executed affidavit contemporaneously with this motion. The affidavit will be filed within the next several days.

Finally, granting a stay will not unduly delay these proceedings, since the appeal (or, if necessary, the petition for mandamus) can be undertaken in an expedited fashion. The legal issue involved in USAA's proposed certified appeal (or, if certification is denied, in USAA's planned mandamus action) already had been extensively briefed by the parties.[3] Briefing and argument in the Ninth Circuit therefore readily can be compressed to the point that a stay pending appeal will not indefinitely suspend the proceedings in this case. Specifically, immediately after this Court's ruling on the motion to certify, USAA will move for expedited briefing and consideration of the appeal by the Court of Appeals. USAA will propose that its brief on the merits of the § 1292(b) appeal be filed within the same 10-day period that the statute allows for filing the petition for leave to appeal from this Court's certification order, that Plaintiffs be given 15 days to file their brief, and that USAA be given 5 days to file its reply brief. Likewise, USAA commits to promptly filing any petition for mandamus should this Court not grant § 1292(b) certification, and to proposing a similar expedited schedule if the Ninth Circuit grant mandamus review. In sum, USAA will make every effort to move forward with appellate review of the jurisdictional issue as expeditiously as possible. Perhaps the best evidence of USAA's commitment in this regard is the fact that the motion for § 1292(b) certification and this motion for a

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[3] For this reason, USAA is planning to file an ex parte application for an order shortening the time for consideration of this motion and the motion to certify.

stay are filed on the first business day following this Court's entry of the Order.

CONCLUSION

For the foregoing reasons, USAA motion for a stay of proceedings pending review should be granted, and this Court should enter an order staying discovery and all other proceedings in this case until the later of: (i) resolution of USAA's pending motion for certification pursuant to 28 U.S.C. § 1292(b) and of the resulting certified appeal; and (ii) resolution of USAA's petition for mandamus, which will be filed if the motion for certification is not granted.

Respectfully submitted,

DANIELS, BARATTA & FINE

By: /s/ Paul R. Fine
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Dated: February 11, 1992

VERIFICATION

STATE OF CALIFORNIA, COUNTY OF

I have read the foregoing _____

_____ and know its contents

[X] CHECK APPLICABLE PARAGRAPH

[ ] I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am [ ] an Officer [ ] a partner _____ [ ]

a _____ of _____

_____

a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason. [ ] I am informed and believe and on that ground allege that the matters stated in the foregoing document are true. [ ] The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

[ ] I am one of the attorneys for _____ , a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices, and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, 19 _____, at _____, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Type or Print Name _____ Signature _____

PROOF OF SERVICE
1013A (3) CCP Revised 5/1/88

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California.

I am over the age of 18 and not a party to the within action; my business address is: 555 West 5th Street, Suite 4600, Los Angeles, California 90013

On 2/11/, 19 92. I served the foregoing document described as Memorandum Of Points And Authorities In Support Of Defendant's Motion For A Stay Of Proceedings Pending Review

_____ on the interested parties in this action

[ ] by placing the true copies thereof enclosed in sealed envelopes addressed as stated on the attached mailing list:

[X] by placing [ ] the original [x] a true copy thereof enclosed in sealed envelopes addressed as follows:

Frank M. Darras, Esq.
William M. Shernoff, Esq.
Shernoff, Bidart & Darras
600 South Indian Hill Blvd.
Claremont, CA 91711-5498

[X] BY MAIL

[ ] *I deposited such envelope in the mail at

_____, California.

The envelope was mailed with postage thereon fully prepaid.

[X] As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing.

Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on February 11, , 19 92 , at

Los Angeles , California.

[ ] **(BY PERSONAL SERVICE) I delivered such envelope by hand to the offices of the addressee.

Executed on _____, 19 _____, at

_____, California.

[ ] (State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Martha Espelage — Type or Print Name

/s/ Martha Espelage — Signature

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L. TYSCH, #128389
Members of the Firm
SHERNOFF, BIDART & DARRAS
600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. 91 3615 JSL (GHKx) OPPOSITION TO MOTION FOR CERTIFICATION AND MOTION TO STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES Date: February 28, 1992 Time: 8:45 a.m. Room: Telephonic Argument

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

Plaintiffs LAUGHLIN E. WATERS and VOULA D. WATERS hereby oppose the Motion for Certification and the Motion to Stay Proceedings of defendant UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA") on the grounds that the issues presented are not appropriate for interlocutory review, on the grounds that the motions presented are nothing more than further evidence of USAA's penchant for forum-shopping and on the further grounds that stay of the proceedings is not warranted or justified.

Plaintiffs' opposition is based on this Opposition, the attached Memorandum of Points and Authorities, all papers, pleadings and records on file in this action and on such other and further argument and evidence as may be presented.

Dated this 25 day of February, 1992 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: /s/ W M S
William M. Shernoff
Attorneys for Plaintiff

MEMORANDUM OF POINTS AND AUTHORITIES

1.

INTRODUCTION

Plaintiffs and their counsel are dismayed at USAA's current conduct in seeking to obtain interlocutory review of the order denying the motion to dismiss and in seeking a further stay of this action. USAA was content to waste

the time, money, resources and judicial talent of the litigants and courts in the 172 cases documented in plaintiffs' motion for sanctions. In those cases, USAA laid in wait. If the results were favorable, USAA would remain silent about the jurisdictional issues. If the results were bad, USAA would put out all the stops to challenge jurisdiction so it could engage in its decade-long game of jurisdictional hopscotch. In light of USAA's past conduct, the present motions are a slap in the face to the Ninth Circuit.

USAA has presented no plausible reason for further delaying this action by requiring a stay of the proceedings and permitting interlocutory review. Moreover, USAA's veiled threat that if the motion for interlocutory review is not granted, it will seek a writ of mandamus is yet another "power play" tactic which exemplifies USAA's "win at any cost" attitude. It is just this attitude which justifies an award of sanctions in this case.

2.

THERE IS NO JUSTIFICATION FOR STAYING THE DETERMINATION OF THE SANCTIONS ISSUE

In conjunction with its motion for interlocutory appeal, USAA seeks to stay the pending discovery and pending hearing on plaintiffs' motion for sanctions. Such a stay is unjustified and unwarranted.

First, the stay should not be granted for the simple reason that USAA has failed to present a plausible basis for interlocutory appeal. USAA's request is premised on the assumption that this Court will certify the matter for interlocutory appeal, that the Ninth Circuit will accept

the appeal and that USAA will prevail. Those represent USAA's "wish list", but do not reflect reality. As noted in *Robbins Co. v. Lawrence Manufacturing Co.*, 482 F.2d 426 (9th Cir. 1973), interlocutory appeal will be granted only extraordinary cases. Aside from USAA's tortious destruction of Federal decorum and unrivaled tampering with the administration of justice, this is not an extraordinary case. USAA's failed attempt to stay this action and obtain appeal is another calculated, cunning affort to waste the judicial time and resources of this Court and the other parties and delay this action. Since USAA's chance of obtaining interlocutory appeal are remote, at best, there is no justifiable basis for staying or delaying this case any further.

Second, even if interlocutory appeal were granted, even if the Ninth Circuit agreed to accept the appeal and even assuming the Ninth Circuit ultimately determined there was no jurisdiction, that would not affect the sanction issue. As noted in plaintiff's motion for sanctions, and which has never been disputed by USAA, this Court has the power to sanction USAA's conduct even if it were ultimately determined that this Court has no jurisdiction. (*Cooter & Gell v. Hartmarx Corp.*, ___ U.S. ___, 110 S.Ct. 2447, 2455, 110 L.Ed.2d 359 (1990); *Eash v. Riggins Trucking, Inc.*, 757 F.2d 557 (3rd Cir. 1985).) There is thus no justification whatsoever for further delaying the determination of the sanctions issue in this case.

Indeed, the fact that the sanction issue remains pending serves as yet another basis for denying interlocutory review. No doubt, USAA will seek to obstruct, delay and challenge any imposition of sanctions by this honorable Court. Permitting USAA interlocutory appeal now will

only cause further duplicative effort when USAA challenges the sanction award.

USAA should not be permitted to allow is [sic] tactical antics to further delay determination of plaintiffs' sanction request. Since interlocutory appeal is not appropriate in this case and since there is no further justifiable basis for ordering a stay of the discovery regarding sanctions or the sanction hearing itself, the stay should be denied.

3.

STAY OF DISCOVERY IN THIS ACTION IS COMPLETELY UNWARRANTED AND UNJUSTIFIED

First USAA refused to provide responses to plaintiffs' discovery requests in this action on the basis that jurisdiction was in issue. Now that this Court has determined that there is jurisdiction of this matter, USAA seeks to further delay plaintiffs' discovery. Such a request is outrageous, unjustifiable and itself a basis for sanctions.

4.

THERE IS NO SUFFICIENT BASIS TO JUSTIFY INTERLOCUTORY APPEAL ON THE ISSUE OF JURISDICTION IN THIS CASE

The jurisdictional issue which USAA wishes to have reviewed by the Ninth Circuit was superbly briefed and ably argued and this Court's order was well-reasoned. Interlocutory review may be obtained only where the order under review involves:

a. A question of law;

b. Which is controlling;

c. On which there is substantial ground for difference of opinion; and

d. In which an immediate appeal will materially advance the ultimate termination of the litigation. (28 U.S.C. section 1292(b).)

Absent every one of those factors, interlocutory review cannot be granted. All be [sic] factors necessary to permit interlocutory review are simply not present.

(1) The matter is not simply "a question of law".

As noted in plaintiffs' opposition to the Motion to Dismiss, the issue of jurisdiction has an inherent factual underpinning. (*Thornhill Publishing Co., Inc. v. General Telephone & Electronics Corp.*, 594 F.2d 730 (9th Cir. 1979).) Since there are issues of fact concerning USAA's status as a corporation *under Texas law* which relate to and are determinative of the jurisdictional issue, interlocutory appeal is not warranted.

(2) The issue presented is not "controlling" on the merits of this action.

Although USAA argues that the jurisdictional issue will make this case go away, USAA is being very shortsighted. The merits of this action relate to USAA's bad faith and the determination of the jurisdictional issue will have no effect on that whatsoever. If this action were tried to a jury and the jury finds in favor of plaintiffs, even if the Ninth Circuit later determined there was no

jurisdiction, the likelihood that USAA would retry the entire action rather than settling is virtually nonexistent. Thus, even if the jurisdictional issue is later decided in USAA's favor, the trial will have served its purpose and the matter would be resolved without any waste of judicial and litigant resources. Similarly, if plaintiffs lose on the jurisdictional issue, the same trial will still be necessary. An adverse ruling on the jurisdictional issue simply will not resolve the *merits* of the action.

(3) There is no substantial ground for difference of opinion.

Despite the fact that USAA has presented decisions from two other circuits, there is no proper basis for finding that those decisions create a substantial ground for differences of opinion. USAA has failed to show that those other courts considered, in ruling on the jurisdictional issue, and the effect of the changes in Texas corporation law which expressly defines a reciprocal insurance exchange as a corporation. Absent that showing, the other decisions are meaningless.

It is ironic that USAA suddenly claims that its federal diversity jurisdiction status is now a basis for difference of opinion in light of its decade of effort in invoking federal jurisdiction when it suited USAA's purpose.

Finally, the fact that other circuits have ruled in one way on a matter is not controlling on either this court or the appellate courts of this circuit. Indeed, the Ninth Circuit has expressly ruled that the decisions of the Second Circuit (*California State Bd. of Equalization of Goggin*, 245 F.2d 44 (9th Cir. 1957), *cert. den.*, 353 U.S. 961, 77 S.Ct.

863, 1 L.Ed.2d 910) and the Tenth Circuit (*Strand v. Schmittroth*, 251 F.2d 590 (9th Cir. 1958), *cert. dis.*, 355 U.S. 896, 78 S.Ct. 258, 2 L.Ed.2d 186) are not binding on it.

(4) Appeal now will not materially advance the ultimate termination of the litigation.

Since the same bad faith issues will have to be litigated, no matter what the forum, appeal now will not significantly advance the *ultimate* termination of this litigation. This is a simple, straightforward bad faith case. USAA has no valid defense to its bad faith actions. There are no issues of policy interpretation. There are no issues of complex valuation. In fact, in short order, the only remaining issues will be USAA's liability for its bad faith conduct. This is a case where USAA "low-balled" the wrong folks and the evidence of that is simple and straightforward. In fact, plaintiffs could try this case in less than a week and are willing to have the trial date advanced to a week following the hearing on the sanctions issue. Thus, the entire matter can be resolved expeditiously and the entire matter appealed after final judgment.

5.

EVEN IF USAA HAD ESTABLISHED A PROPER BASIS FOR INTERLOCUTORY REVIEW, THIS CASE SIMPLY DOES NOT WARRANT IT

Even if USAA had established that the factors necessary for interlocutory review were present, certification is not warranted in this case. Interlocutory review is granted "only in extraordinary circumstances where the

decision might avoid protracted and expensive litigation." (*Robbins, supra.*) Interlocutory review is *not* to be granted in ordinary actions that can be tried on their merits in a few days. (*Cardwell v. Chesapeake & Ohio Railway*, 504 F.2d 444 (6th Cir. 1974).) As noted, this action *can* be tried in a few days. *All* the issues can be resolved and one appeal taken from the final judgment. Denying interlocutory review now will not foreclose USAA's right to challenge jurisdiction after final judgment. Nothing will be lost and, should USAA come to its senses in the meantime and settle this action, much will be gained by preventing the waste of judicial resources in this Court, in the Ninth Circuit Court and in the Supreme Court by precluding USAA's ability to further delay this action now.

6.

CONCLUSION

USAA has failed to provide any justifiable basis for invoking the extraordinary remedy of interim review. USAA has presented no new factual or legal arguments which justifies this Court impeding the timely progress of this action. Indeed, USAA's motions are nothing more than further evidence of its hardball tactics which will burden this court, the appellate court and the litigants without dealing with the merits of a case. Having failed to do so, USAA's motions should be denied.

Dated this 25 day of February, 1992 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: /s/ W M Shernoff
William M. Shernoff
Attorneys for Plaintiff

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On FEB. 25 1992, I served the foregoing document described as:

OPPOSITION TO MOTION FOR CERTIFICATION AND MOTION TO STAY PROCEEDINGS; MEMORANDUM OF POINTS AND AUTHORITIES

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
Daniels, Baratta & Fine
1801 Century Park East
Ninth Floor
Los Angeles, California
90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

COURTESY COPY TO: JUDGE WM. FREMMING NIELSEN

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[X] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

Paul Fine, Esq. / Daniels, Baratta & Fine / (213) 556-2807

February 25, 1992 at approx. 4:15 PM.

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on FEB. 25 1992, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS, Plaintiffs, -vs- UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	NO. CV-91-3615-WFN ORDER DENYING MOTIONS FOR CERTIFICATION AND TO STAY PROCEEDINGS (Filed Mar 16, 1992)

THIS CONSTITUTES NOTICE OF ENTRY
AS REQUIRED BY FRCP, RULE 77(d)

Before the Court are defendant's Motions to Certify a Court Order for Appeal and for stay Pending Appeal, heard on February 28, 1992 before the Honorable Wm. Fremming Nielsen. Appearing telephonically were William Shernoff and Frank Darras for plaintiffs; and Paul Fine and Timothy Dyk for defendant. Having reviewed the record, having heard the oral argument of counsel and being fully advised, this Court **DENIES** the motions for certification and stay.

Plaintiffs initiated this diversity action against their insurer, United Services Automobile Association [USAA], seeking amounts allegedly due under their insurance contract and alleging bad faith on the part of USAA in denying these sums. USAA moved for dismissal based on lack of subject matter jurisdiction, alleging that USAA is a non-corporate entity with members who reside in the state of California and therefore a non-diverse party. By

Order entered February 7, 1992, this Court held that USAA could be treated like a corporation for diversity purposes and therefore this Court has subject matter jurisdiction in this instance. It is this Order that USAA wishes to appeal and proposes a stay of proceedings pending that review.

Without question "there is a strong policy behind the rule that appeals are to be made only following final judgment on the merits." *In re Cement Antitrust Litigation* (MDL No. 296), 673 F.2d 1020, 1023 (9th Cir. 1982). However, there are exceptions to that rule, one of which is found at 28 U.S.C. § 1292(b) (1988) which provides in pertinent part:

> When a district judge . . . shall be of the opinion that [an] order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . . [A]pplication for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

From this rule case law has singled out three components necessary for certification, they are "(1) that there be a controlling question of law, (2) that there be substantial grounds for difference of opinion, and (3) that an immediate appeal may materially advance the ultimate termination of the litigation." *Cement Antitrust Litigation*, 673 F.2d at 1026. Unquestionably the first two elements are met in this case; i.e., whether this Court has subject matter jurisdiction is a controlling question of law and

the fact that the Second and Tenth Circuits have held that USAA citizenship must be determined by reference to all of its members indicates that there are substantial grounds for difference of opinion. However there are serious questions whether an appeal will materially advance the ultimate termination of this litigation.

This is not the type of appeal that will terminate the dispute altogether as could a statute of limitations determination. Though reversal of this Court's Order by the Court of Appeals would terminate jurisdiction as to the merits of this case, still pending would be the important issue of whether sanctions should be levied against USAA for their conduct in federal court. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384 (1990) ("[C]ourt may consider collateral issues after an action is no longer pending."). This Court has set a hearing on the sanctions issue for May 14, 1992, therefore if this Court were to grant certification for appeal of the February 7, 1992 Order, it would be promoting the piecemeal litigation so abhorred by the general rule which only permits appeal from a final order.

The Ninth Circuit has adopted a narrow approach to interlocutory appeals, "[t]he precedent in this circuit has recognized the congressional directive that Section 1292(b) is to be applied sparingly and only in exceptional cases." *Cement Antitrust*, 673 F.2d at 1027. *Cement Antitrust* defined exceptional situations as those "in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *Id.* at 1026. This is not protracted litigation. Since USAA indicates a need to immediately resolve the conflict between the circuits as to jurisdiction, the Waters have indicated that they would be

willing to have the case moved from its current September trial date to June in order to expedite a final decision from which USAA could appeal. This is in no way protracted as the Court has now reset the trial to June 22, 1992. As the appeal should rightfully wait at least until the sanctions issue is determined, the delay of a mere six weeks for a final determination does not, in this Court's opinion, represent an unjust burden when, if the Court's prior Order is affirmed, the entire litigation may come to an end. This is not a complex case, it can be dealt with efficiently and quickly and clearly is not the type that was within the contemplation of Congress when they wrote the exception to the rule of final appeals in 28 U.S.C. § 1292(b). *See* also *Cardwell v. Chesapeake & Ohio Ry. Co.*, 504 F.2d 444, 446-47 (6th Cir. 1974) ("ordinary suit for personal injuries or wrongful death that can be tried and disposed of on its merits within a few days . . . should not be considered on interlocutory appeal").

Finally, USAA contends that a stay of the proceedings is necessary to avoid undue burden or expense. This argument is devoid of merit. This case will proceed whether in state or federal court, and the same substantive rules of law will be applied. USAA has advanced no argument on how following the Federal Rules of Civil Procedure will unduly prejudice them as opposed to following a state rule of procedure. Further, it is axiomatic that discovery is best completed as soon as possible after the incident at issue.

The parties are also in disagreement regarding the Waters' request for documents from USAA served in the form of a subpoena. The Waters assert that this form was chosen in order to make sure the materials were available

in time to review them for the sanctions hearing in May. USAA asserts that a subpoena is inappropriate and the material should be requested through the discovery process. The parties have agreed to a March 16, 1992 deadline for the documents to be produced, and that any objections on the part of USAA will be well in advance to have this matter resolved before the hearing. Accordingly,

IT IS ORDERED that:

1. The motion for Certification for Appeal and the Motion for Stay Pending Review are hereby **DENIED.**

2. The trial date of September 14, 1992 is **moved up to June 22, 1992 at 9:00 a.m.** The Clerk will notify the parties as to the courtroom assignment prior to trial.

3. The sanctions hearing shall be **continued from May 11, 1992 to May 14, 1992 at 1:30 p.m.** The clerk will notify the parties as to the courtroom assignment prior to the hearing.

4. USAA shall treat the Waters' subpoena as a request for documents and **respond by March 16, 1992.** If USAA plans to object to his request, it shall do so well in advance of the March 16, 1992 date and this Court will expedite any hearing regarding such objections.

IT IS SO ORDERED. The Clerk is hereby **DIRECTED** to enter this Order and forward copies to counsel.

DATED this 11 day of March, 1992.

/s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L.TYSCH, #128389
D. SCOTT MOHNEY, #124426
Members of the Firm
SHERNOFF, BIDART & DARRAS
600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS and VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. CV-91-3615-WFN FORMAL REQUEST FOR DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE, RULE 34

DEMANDING PARTY: Plaintiffs, LAUGHLIN E. WATERS and VOULA D. WATERS

RESPONDING PARTY: Defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION

SET NO.: ONE

TO THE DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION, AND TO ITS ATTORNEYS OF RECORD:

Pursuant to the Federal Rules of Civil Procedure, Rule 34, plaintiffs hereby formally demand production and inspection of the following documents at the hour of 10:00 a.m. on MAR. 18, 1992, at the office of plaintiffs' attorneys located at 600 South Indian Hill Boulevard, Claremont, California.

The manner of inspection shall be personal inspection including the copying or photographing by or on behalf of the plaintiffs the below-mentioned documents, and other tangible things. If you withhold any documents requested because you claim a privilege, state the privilege claimed for each and every document, describe each document by its author, describe the name and occupation of the author, describe the name and occupation of each recipient, date of issuance, who, if anyone, received a copy of the document, and its general subject mater, including a brief description of the nature and context. Please number the documents produced sequentially to conform with the order in which the documents are maintained in your files.

A personal appearance by defendant and/or counsel is not required if defendant will submit copies of the documents described below with their verification, executed under penalty of perjury, verifying that the copies provided are accurate and true copies of the complete records requested.

PLEASE NOTE: Federal Rules of Civil Procedure, rule 34(b) requires two acts for compliance with this request:

(1) Service of a written response under oath within 30 days; and

(2) Production of documents or tangible things on or before the date of production specified above.

DEFINITION

(1) The term "writings" refers to all writings as defined in Federal Rules of Evidence, rule 1001.

The following designated items for discovery and production pertain to Homeowners Policy number 165 45 98 92A ("the Policy") and the claim which was filed by plaintiffs pursuant to said Policy, and which is the subject of this litigation.

1. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: Homeowners Policy number 165 45 98 92A issued by defendant to plaintiffs on or about July 15, 1990 including all attachments, endorsements, amendments, and/or riders from date of first issue to plaintiffs until the present;

2. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: The complete claim file (whether home office, regional office, local or other office) pertaining to the claim listed above from December 17, 1990 to the present including, but not limited to, the file folder or file;

3. All inter-office memoranda or other form of written communication of any employee of defendant relating to the initial processing of the claim listed above when defendant first received said claim;

4. All inter-office memoranda or other form of written communication from any employee of defendant relating to the continued processing of plaintiffs' claim listed above;

5. All written communication between plaintiffs and defendant, including all proof of loss forms;

6. All written communication between defendant and any third party concerning the processing, acceptance, or denial of the claim listed above;

7. All medical and investigative reports concerning plaintiffs and the claim listed above, and all written communication between defendant and any third party concerning said report or reports;

8. All inter-office memoranda or other form of written communication from any employee of defendant concerning denial of the claim listed above;

9. All written communication between defendant and plaintiffs concerning denial of the claim listed above;

10. all written communication between defendant and any third party or third party's attorney concerning denial of the claim listed above;

11. All photographs, motion pictures, videotapes or investigative reports of defendant concerning plaintiffs taken by or on behalf of defendant, relating to the processing or denial of the claim listed above;

12. All other written documents including correspondence, telephone notes, Telex, and fax pertaining to the processing of the above claim in the possession of defendant not designated in requests numbers 1 through 11;

13. All file folders or file jackets and adjacent or related exhibit folders in which any documents or other materials or items described in requests numbered 1 through 12 above are filed or maintained;

14. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: The complete and original underwriting file pertaining to the above-mentioned Policy from January 1, 1990 to the present including, but not limited to, the file folder or file folders themselves, adjacent exhibit folders, all papers, documents, and investigative reports directly pertaining to the above-mentioned Policy including but not limited to inter-office memoranda or notes pertaining to the issuance of the above-mentioned Policy, and any and all written communications or statements made between defendant and other parties, which directly pertain to issuance of the above-mentioned Policy to plaintiffs;

15. Any and all documents designated in requests numbered 1 through 14 that are located outside of or apart from the claim or underwriting file;

16. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: The complete claims manuals and/or procedures manuals, policy statements or memoranda which set forth company practices or policies

regarding the handling, processing and/or investigation of claims submitted by your insured and which was or should have been utilized by you at the time plaintiffs' claim, submitted pursuant to the above-referenced Policy, was handled, processed and/or investigated;

17. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: All additions, revisions, deletions or other changes that have been made in the above-referenced claims manuals and/or procedures manuals from the time plaintiffs' claim was submitted up to and including the present;

18. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: Any other documents including, but not limited to, inter-office memoranda, notes, files or reports outlining or describing procedures for claims handling, processing and investigation and which were or should have been utilized by you at the time plaintiffs' claim was handled, processed and/or investigated;

19. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: Any and all "writings" which constitute all advertising, sales, promotional and/or marketing materials, including sales, promotional, marketing and/or advertising brochures, pamphlets, memoranda and/or letters, or any other type of "writings" whatsoever, used by your company to sell, promote, market and/or advertise the type of insurance coverage which is the subject matter of this action to the

general public, including, but not limited to, multiple employer trusts, employer groups and/or individuals for the time period January 1, 1990 to July 1, 1990;

20. Pursuant to 28 U.S.C. section 1732, a true and correct copy of the following item which has been kept in the regular course of business: Any and all "writings" which constitute all advertising, sales, promotional and/or marketing materials, including sales, promotional, marketing and/or advertising brochures, pamphlets, memoranda and/or letters, or any other type of "writings" whatsoever, provided by your company to your sales force of agents and/or employees to guide, explain, instruct or teach them your company's preferred and/or designed method of promoting, marketing, advertising and/or selling the type of insurance coverage which is the subject matter of this action to the general public, including, but not limited to, multiple employer trusts, employer groups or individuals for the time period January 1, 1990 to July 1, 1990.

DATED This 14 day of February, 1992, at Claremont, California.

SHERNOFF, BIDART
& DARRAS

By: /s/ Frank N. Darras
FRANK N. DARRAS
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On FEB. 14 1992, I served the foregoing document described as:

FIRST SET OF REQUEST FOR PRODUCTION OF DOCUMENTS PROPOUNDED TO USAA

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
Daniels, Baratta & Fine
1801 Century Park East
Ninth Floor
Los Angeles, California
90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was

mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on FEB. 14 1992, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L. TYSCH, #128389
D. SCOTT MOHNEY, #124426
Members of the Firm
SHERNOFF, BIDART & DARRAS
600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. CV-91-3615-WFN INTERROGATORIES

PROPOUNDING PARTY: Plaintiffs, LAUGHLIN E. WATERS and VOULA D. WATERS

RESPONDING PARTY: Defendant, UNITED STATES [sic] SERVICES AUTOMOBILE ASSOCIATION

SET NO.: ONE

TO THE DEFENDANT, UNITED STATES [sic] SERVICES AUTOMOBILE ASSOCIATION, AND TO ITS ATTORNEYS OF RECORD:

Plaintiffs request that pursuant to Federal Rules of Civil Procedure, rule 33, each of the following interrogatories be answered fully, separately, and under oath within thirty (30) days by defendant.

INTERROGATORIES

1. List the names and addresses of all individuals acting on your behalf, other than individuals performing merely clerical functions, who were involved in the handling of plaintiffs' claim which is the subject matter of this litigation.

2. For each of the individuals named in response to interrogatory no. 1 above, please state the job title or classification held by that individual at the time that individual handled the claim.

3. For each of the individuals named in response to interrogatory no. 1 above, please state the current title or job classification held by that individual.

4. For any individual named in response to interrogatory no. 1 above who no longer works for your company, please provide his or her last known address.

5. Of those persons listed in response to interrogatory no.1 above, please state the names of those individuals in a MANAGERIAL CAPACITY [the term MANAGERIAL CAPACITY is defined as whether that employee could dispose of the insurance claim with little or no supervision; it is the degree of discretion the

employee possesses in making a decision and not his/her "level" in the corporate hierarchy] who made the decision to offer the proposal that was communicated to plaintiffs in the May 30, 1991 letter.

6. Is defendant, UNITED SERVICES AUTOMOBILE ASOCIATION, relying on the advice of counsel as a defense in this case?

Dated this 14 day of February, 1992 at Claremont, California.

SHERNOFF, BIDART
& DARRAS

By: /s/ Frank N. Darras
FRANK N. DARRAS
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On FEB. 14 1992, I served the foregoing document described as:

FIRST SET OF INTERROGATORIES PROPOUNDED TO USAA

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy

thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
Daniels, Baratta & Fine
1801 Century Park East
Ninth Floor
Los Angeles, California
90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in [sic] affidavit.

[ ] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

To expedite the delivery of the above-named document, said document was sent via overnight courier for next day delivery to:

[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at those [sic] direction the service was made.

Executed on FEB. 14 1992, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L. TYSCH, #128389
D. SCOTT MOHNEY, #124426
Members of the Firm
SHERNOFF, BIDART & DARRAS
600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. CV-91-3615-WFN INTERROGATORIES

PROPOUNDING PARTY: PLAINTIFFS, LAUGHLIN E. WATERS AND VOULA D. WATERS

RESPONDING PARTY: DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION

SET NO.: Two

TO THE DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION, AND TO ITS ATTORNEYS OF RECORD:

Plaintiff requests that pursuant to Federal Rules of Civil Procedure, rule 33, each of the following interrogatories be answered fully, separately, and under oath within thirty (30) days by defendant.

INSTRUCTIONS

In answering these interrogatories, you are required to furnish information not only within your own knowledge or obtainable by you, but any information or knowledge in the possession of or obtainable by your attorneys, investigators, adjusters, insurance carrier, representatives, agents, or anyone acting on your behalf or their behalf.

If you are unable to answer the question in full after exercising due diligence to secure the information to do so, answer as completely as possible and then explain the reason you are unable to answer more fully, and state the name, address (business and residence) of any person or persons able to supply the information.

If you determine that any question is not applicable, and consequently deserves no answer, state in detail why it is not applicable.

The term "you" or "your" refers to you, your agents, employees, investigators or anyone acting in your behalf.

The term "document(s)" includes all writings, recordings, photographs, motion pictures, electronic computer data storage, or other form of recordation or reproduction, whether original or copies.

INTERROGATORIES

1. Identify each person whom you expect to call as an expert witness at trial.

2. As to each person whom you expect to call as an expert witness at trial, state the subject matter on which the expert is expected to testify, the substance of the facts and the opinions to which the expert is expected to testify, and a summary of the grounds for each opinion.

Dated this 14 day of February 1992, at Claremont, California.

SHERNOFF, BIDART
& DARRAS

By: /s/ Frank N. Darras
FRANK N. DARRAS
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address-is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On FEB. 14 1992, I served the foregoing document described as:

SECOND SET OF INTERROGATORIES PROPOUNDED TO USAA

on all interested parties in this action:

[ ] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[X] by placing [ ] the original [X] a true copy

thereof enclosed in sealed envelopes addressed as follows:

Paul R. Fine, Esq.
Daniels, Baratta & Fine
1801 Century Park East
Ninth Floor
Los Angeles, California
90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant
UNITED SERVICES
AUTOMOBILE
ASSOCIATION

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation

date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

[ ] BY PERSONAL SERVICE

I caused to be delivered by hand to the above-listed addressees or to the addressees on the list attached hereto.

[ ] BY OVERNIGHT MAIL/COURIER

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[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this court at those [sic] direction the service was made.

Executed on FEB. 14 1992, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

AO 88 (Rev 11/91) Subpoena in a Civil

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS, et al.

V.

UNITED SERVICES AUTOMOBILE ASSOCIATION

SUBPOENA IN A CIVIL CASE

CASE NUMBER:
CV 91 3615 WFN

TO: Custodian of Records
United Services Automobile Association
9800 Fredericksburg Road
USAA Building, San Antonio, Texas 78288
(512) 498-2211

[ ] YOU ARE COMMANDED to appear in the United States District Court at the place, dated, and time specified below to testify in the above case.

PLACE OF TESTIMONY) COURTROOM
)
) _____
) DATE AND TIME
)

[ ] YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME

[X] YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

* * * SEE ATTACHMENT "1" * * *

PLACE	DATE AND TIME
APPEARANCE NOT REQUIRED. MAIL COPIES TO: Shernoff, Bidart & Darras 600 South Indian Hill Boulevard Claremont, California 91711	MARCH 5, 1992

[ ] YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
/s/ Frank N. Darras FRANK N. DARRAS, Attorneys for Plaintiffs	FEB. 14 1992

ISSUING OFFICER'S NAME ADDRESS AND PHONE NUMBER	
600 S. Indian Hill Blvd. Claremont, CA 91711	FRANK N. DARRAS, ESQ. SHERNOFF, BIDART & DARRAS (714) 621-4935

ATTACHMENT "1"

DEFINITION

(1) The term "writings" refers to all writings as defined in Federal Rules of Evidence, rule 1001.

DOCUMENTS

1. All declarations or affidavits filed on behalf of USAA in each and every case listed in attached Exhibit "A", pertaining to the issue of jurisdiction in each respective court action.

2. All inter office memos, correspondence, memoranda or writings by USAA or any employee of USAA in each and every case listed in attached Exhibit "A", pertaining to the issue of jurisdiction in each respective court action.

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 1992, I caused to be served one copy of the foregoing Appendix to Petition For A Writ Of Mandamus Or Other Appropriate Relief by hand upon:

William M. Shernoff, Esq.
Shernoff, Bidart & Darras
600 South Indian Hill Boulevard
Claremont, California 91711-5498

Clerk of the Court
United States District Court for
the Central District of California
312 North Spring Street
Los Angeles, California 90012

and by Federal Express upon:

The Honorable Wm. Fremming Nielsen
United States District Court for the
Eastern District of Washington
938 United States Courthouse
Spokane, Washington 99210-2208

/s/ Laurie F. Calder
Laurie F. Calder, Esq.

Counsel for Petitioner
United Services
Automobile Association

WILLIAM M. SHERNOFF, #38856
MICHAEL J. BIDART, #60852
FRANK N. DARRAS, #128904
GARY L. TYSCH, #128389
D. SCOTT MOHNEY, #124426
Members of the Firm
SHERNOFF, BIDART & DARRAS
600 South Indian Hill Boulevard
Claremont, California 91711-5498
(714) 621-4935

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

LAUGHLIN E. WATERS AND VOULA D. WATERS, Plaintiffs, v. UNITED SERVICES AUTOMOBILE ASSOCIATION, Defendant.	Case No. CV-91-3615-WFN FORMAL REQUEST FOR DISCOVERY AND PRODUCTION OF DOCUMENTS AND THINGS FOR INSPECTION, COPYING OR PHOTOGRAPHING PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE, RULE 34

DEMANDING PARTY: Plaintiffs, LAUGHLIN E. WATERS and VOULA D. WATERS

RESPONDING PARTY: Defendant, UNITED SERVICES AUTOMOBILE ASSOCIATION

SET NO.: TWO

TO THE DEFENDANT, UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"), AND TO ITS ATTORNEYS OF RECORD:

Pursuant to the Federal Rules of Civil Procedure, rule 34, plaintiffs hereby formally demand production and inspection of the following documents at the hour of 10:00 a.m. on ___, 1992, at the office of Plaintiff's attorneys located at 600 South Indian Hill Boulevard, Claremont, California.

The manner of inspection shall be personal inspection including the copying or photographing by or on behalf of the plaintiffs the below-mentioned documents, and other tangible things. If you withhold any documents requested because you claim a privilege, state the privilege claimed for each and every document, describe each document by its author, describe the name and occupation of the author, describe the name and occupation of each recipient, date of issuance, who, if anyone, received a copy of the document, and its general subject matter, including a brief description of the nature and context. Please number the documents produced sequentially to conform with the order in which the documents are maintained in your files.

A personal appearance by defendant and/or counsel is not required if defendant will submit copies of the documents described below with their verification, executed under penalty of perjury, verifying that the copies provided are accurate and true copies of the complete records requested.

PLEASE NOTE: Federal Rules of Civil Procedure, rule 34(b) requires two acts for compliance with this request:

(1) Service of a written response under oath within 30 days; and

(2) Production of documents or tangible things on or before the date of production specified above.

DEFINITION

(1) The term "writings" refers to all writings as defined in Federal Rules of Evidence, rule 1001.

DOCUMENTS REQUESTED

1. All writings, including correspondence, from USAA to USAA's counsel of record in each and every case listed in attached Exhibit "A", pertaining to the issue of jurisdiction in each respective court action.

2. All writings, including correspondence, from USAA's counsel of record to USAA in each and every case listed in attached Exhibit "A", pertaining to the issue of jurisdiction in each respective court action.

3. As referenced on page 11 of defendant's Opposition to Request for Sanctions, "the internal memorandum to all senior claims attorneys, claims attorneys, supervisors of litigation, regional claims management, and casualty file handlers reminding them that 'USAA shall appear neither as a plaintiff nor defendant in federal court when diversity is the jurisdictional basis' " and any prior drafts of the internal memorandum.

4. As referenced on page 11 of defendant's Opposition to Request for Sanctions, "the memorandum from its General Counsel to all of its approximately 3,200 outside counsel advising them that '[u]nder no circumstances should any case involving USAA be commenced in, defended in, or removed to federal court on the basis of diversity jurisdiction' ", and any prior drafts of the memorandum.

5. As referenced on pages 11 and 12 of defendant's Opposition to Request for Sanctions, the "special notice to its new case file forms specifying that 'USAA, a reciprocal interinsurance exchange, as an entity, is not subject to federal diversity jurisdiction in any of the federal district' ", and any prior drafts of the special notice.

6. As referenced on page 12 of defendant's Opposition to Request for Sanction, any and all documents, writings, memorandums, or manuals evidencing that USAA "updated its internal docketing procedures and investigated available computer software to enable it to better track all pending court cases."

7. As referenced in the Report on Measures Undertaken to Insure that United Services Automobile Association, as an Entity, will not be a Party in Federal Court Actions Based on Diversity of Citizenship ("the report"), the bulletin that was sent by USAA to "all regional claims officials . . . in the various USAA offices advising them of the diversity issue", and any prior drafts of the bulletin.

8. As referenced in the report, the December 12, 1988 memorandum sent by USAA to all senior claims attorneys, supervisors of litigation, and San Antonio claims counsel staff, and any prior drafts of the bulletin.

9. any and all documents or writings distributed by USAA at, or prepared by USAA for use at the May 10, 1989 legal conference for senior claims attorneys, supervisors of litigation, and regional claims management personnel, as referenced in the report.

10. As referenced in the report, the September 6, 1900 USAA memorandum "addressing the issue to all senior claims attorneys, claim attorneys, supervisors of litigation, regional claim management, and casualty file handlers", and any prior drafts of the memorandum.

11. As referenced in the report, the November 8, 1990 memorandum from USAA's Senior Vice President and General Counsel to all of USAA's approximately 3,200 outside counsel, and any prior drafts of the memorandum.

12. As referenced in the report, the November 14, 1990 attachment, to be included in the USAA Litigation Manual, which explains the diversity problem with respect to USAA, and any prior drafts of the attachment.

13. As referenced in the report, the USAA litigation manual section dealing with diversity or jurisdiction, including all revisions, additions, modifications, or deletions from 1980 to the present.

14. As referenced in the report, the November 20, 1990 revised transmittal memorandum, and any prior drafts of the memorandum.

DATED this 24 day of March, 1992, at Claremont California.

SHERNOFF, BIDART & DARRAS

By: /s/ Frank N. Darras
FRANK N. DARRAS
Attorneys for Plaintiffs

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the county of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 600 South Indian Hill Boulevard, Claremont, California 91711.

On MAR. 24 1992, I served the foregoing document described as:

DEMAND FOR PRODUCTION OF DOCUMENTS
Set No. 2
Propounded to: USAA
Propounded by: Plaintiffs

on all interested parties in this action:

[X] by placing [ ] the original [X] a true copy

thereof enclosed in sealed envelopes addressed as stated on the attached mailing list.

[ ] by placing [ ] the original [ ] a true copy

thereof enclosed in sealed envelopes addressed as follows:

[X] BY MAIL

I caused such envelope to be deposited in the mail at Claremont, California. The envelope was mailed with postage thereon fully prepaid. I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date deposit for mailing in affidavit.

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[ ] BY FACSIMILE ("FAX")

In addition to the manner of proof of service indicated above, a copy was sent by FAX to:

[ ] (State) I declare under penalty of perjury under the laws of California that the above is true and correct.

[X] (Federal) I declare that I am employed in the office of a member of the bar of this

court at whose direction the service was made.

Executed on MAR. 24 1992, at Claremont, California.

/s/ Jo-Ann Shimizo
JO-ANN SHIMIZO

PROOF OF SERVICE LIST

Waters v. USAA
Federal (91-3615WFN)

Paul R. Fine, Esq.
DANIELS, BARATTA & FINE
1801 Century Park East
Ninth Floor
Los Angeles, California 90067
(213) 556-7900
FAX: (213) 556-2807

Attorneys for Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION

Timothy B. Dyk, Esq.
JONES, DAY, REAVIS & POGUE
1450 G Street, N.W.
Washington, D.C. 20005-2088
(202) 879-3939
FAX: (202) 737-2832

Associate counsel for Defendant UNITED SERVICES AUTOMOBILE ASSOCIATION

IN THE
UNITED STATES COURT OF
APPEALS FOR THE NINTH CIRCUIT

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

LAUGHLIN E. WATERS AND VOULA D. WATERS,

Real Parties in Interest.

PETITION FOR WRIT OF MANDAMUS
OR OTHER APPROPRIATE RELIEF
TO THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

Paul R. Fine
Daniels, Baratta & Fine
1801 Century Park East
Los Angeles, CA 90067
(213) 556-7900

Timothy B. Dyk
Laurie F. Calder
Jones, Day, Reavis & Pogue
1450 G Street, N.W.
Washington, D.C. 20008
(202) 879-3939

Counsel for Petitioner United Services Automobile Association

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED SERVICES AUTOMOBILE ASSOCIATION, *Petitioner,*	)
v.	)
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, *Respondent,*	)
and	)
LAUGHLIN E. WATERS AND VOULA D. WATERS, *Real Parties in Interest.*	)

PETITION FOR A WRIT OF MANDAMUS OR OTHER APPROPRIATE RELIEF TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

STATEMENT OF ISSUES PRESENTED

1. Whether the district court committed clear legal error in holding, contrary to the decision of the Supreme Court in *Carden v. Arkoma Assocs.*, 494 U.S. 185 (1990), and decisions of this Court and other circuits, that it should apply a "functional" approach in determining the citizenship of a non-corporate entity for diversity purposes.

2. Whether this case otherwise satisfies the standards for issuance of a writ of mandamus.

STATEMENT OF RELIEF SOUGHT

USAA seeks a writ of mandamus directing the United States District Court for the Central District of California to dismiss the complaint in *Waters v. United Services Automobile Ass'n*, Civ. No. 91-3615 (C.D. Cal.).

INTRODUCTION

Pursuant to 28 U.S.C. § 1651 (1988) and Rule 21 of the Federal Rules of Appellate Procedure, petitioner USAA requests this Court to issue a writ of mandamus or other appropriate relief to the United States District Court for the Central District of California. On February 7, 1992, that court (Judge Wm. Fremming Nielsen) denied USAA's motion to dismiss this case for lack of subject matter jurisdiction, and today denied USAA's motion to certify an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). USAA seeks a writ directing the court to dismiss the action.[1]

This case involves the thus far successful effort of a sitting federal judge, Hon. Laughlin E. Waters, as plaintiff in this action, to improperly invoke the diversity jurisdiction of his own federal court, the United States District Court for the Central District of California. Judge Waters

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[1] Simultaneously herewith petitioner is filing an Emergency Motion under Circuit Rule 27-3 to Stay Proceedings Pending Review.

also seeks to sanction the petitioner/defendant USAA, a reciprocal inter-insurance exchange, which is licensed in Texas but has members in every state, for moving to dismiss the case on jurisdictional grounds. Judge Waters' sanctions motion is still pending in the district court.

All of the sitting federal judges in the Central District having disqualified themselves, on September 9, 1991, the Chief Judge of this Circuit appointed Judge Nielsen from the Eastern District of Washington to hear this case. In agreeing with the plaintiff Waters that he may keep his case in federal court, the court below has rendered a decision directly inconsistent with a recent decision of the United States Supreme Court, with a decision of this Court, and with decisions of the Second and Tenth Circuits holding with respect to this very defendant that federal diversity jurisdiction is not available.

In *Carden v. Arkoma Assocs.*, 494 U.S. 185, 195 (1990), the Supreme Court rejected a functional approach to determining an artificial, unincorporated entity's jurisdictional status, holding instead that courts should, " 'without analysis of the particular entity before [them], count every member of an unincorporated association for purposes of diversity jurisdiction' " (citation omitted). Both this Court and the Fifth Circuit have also applied *Carden*'s general rule. *See Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group*, 823 F.2d 302, 304 (9th Cir. 1987) ("All members of an unincorporated association must be diverse from the opposing party."); *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302, 306 (5th Cir. 1991) (refusing to apply a "characteristic-by-characteristic inquiry" to a Louisiana limited partnership), *cert. denied*, 1992 U.S. LEXIS 1299 (U.S. 1992). Moreover, the Second Circuit in

Baer v. United Services Auto. Ass'n, 503 F.2d 393, 396 (2d Cir. 1974), and the Tenth Circuit in *Tuck v. United Services Auto. Ass'n*, 859 F.2d 842, 845 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989), have held that, under Texas law, USAA is an unincorporated association and thus a citizen of every state in which it has members.

In *Tuck*, The Tenth Circuit further observed that, on a number of occasions, USAA had sued, or permitted itself to be sued, in diversity, even after the Second Circuit's decision in *Baer*. Indicating that it disapproved of USAA's appearing in federal diversity actions, the court warned that it "expect[ed]" USAA to file motions to dismiss "in all pending diversity litigation." *Id.* at 845. n.3.[2]

The decision below puts petitioner in the unenviable and untenable position of having been directed by the Tenth Circuit to dismiss all diversity actions from federal court at the same time that the court below has ordered petitioner to proceed in federal court and threatened to sanction petitioner for, in essence, complying with the Tenth Circuit's direction.

STATEMENT OF FACTS

1. On July 5, 1991, plaintiffs, Judge Laughlin E. Waters and his wife, Voula D. Waters, filed suit against

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[2] Since the Tenth Circuit's 1988 decision in *Tuck*, USAA has taken, and continues to take, numerous measures designed to ensure that it no longer participates in federal diversity cases. Among other actions, USAA has issued a series of memoranda to inside and outside counsel warning them to stay out of federal court and has asked counsel to identify any federal diversity cases in which USAA appears as a party.

USAA in the United States District Court for the Central District of California.[3] The Waters alleged that USAA had breached its duty of good faith and fair dealing under a homeowner's insurance policy by failing to offer adequate reimbursement for the damages that their home had sustained in a fire. The Waters complained that USAA had "unreasonably delay[ed] payments to [them]" in refusing to accept a $442,663.35 bid for repair work by their contractor, TMLC Construction Services Co. ("TMLC") (plaintiffs' claim apparently being that USAA should have agreed to have the work undertaken by their son, Laughlin E. Waters Jr., an Executive Vice President of that Company). Cpl. ¶¶ 11, 25(b) (Tab 3). They further argued that USAA's contractor's bid of $319,019.38 was "meaningless" and indicative of USAA's " 'low bid' estimating approach," Cpl. ¶¶ 13, 14 (Tab 3), and that, as a result of USAA's "unreasonable and bad faith conduct," they had suffered both economic damages and "anxiety, worry, mental and emotional distress," Cpl. ¶¶ 26, 27 (Tab 3). The Waters sought economic, consequential, and punitive damages for the "cruel and unjust hardship" that they had endured. Cpl. ¶ 29 (Tab 3).

Pursuant to its post-*Tuck* policy of avoiding all federal diversity litigation, USAA sought to have the Waters voluntarily dismiss their complaint from federal court, pointing to the decision in *Tuck*. That effort having been unavailing, on July 26, 1991, USAA promptly moved to

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[3] Copies of the complaint and other relevant pleadings in the district court are submitted herewith in a separate Appendix. References to those documents herein will identify their names and Appendix tab numbers.

dismiss the Waters' complaint on the ground that the matter belonged in state court. On October 15, 1991, the Waters opposed USAA's motion and requested that the district court award sanctions in the amount of $1.72 million. The theory of the Waters' sanctions motion is far from clear. Initially, they appeared to complain that petitioners' seeking to dismiss the action was improper. *See* Pl. Opp. at 3 (Tab 5). Forced ultimately to concede that a motion to dismiss was appropriate, the Waters then contended that USAA's motion, while citing *Tuck*, had somehow improperly failed to disclose USAA's past inconsistent positions on the issue and that the Waters, somehow acting as private attorneys general, could appropriately seek to punish USAA for its past behavior in other cases. See Pl. Supp. Opp. at 9-16 (Tab 10).[4] The Waters allowed that the government should receive some of the sanctions for wasting judicial resources on USAA in the past, but indicated that, "[n]aturally, the Waters should receive a portion of the sanctions award for their efforts in bringing the wrongdoer to account." *Id.* at 15-16 (Tab 10). Though they did not suggest that they had suffered any losses from USAA's prompt motion to dismiss their claim, the Waters proposed that the "award of sanctions be split between the U.S. Treasury and [them]." *Id.* at 16 (Tab 10).

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[4] It is, of course, well established that Rule 11 does not authorize the payment of sanctions to an opposing party where no misconduct has occurred in the case before the court. *See* Gregory Joseph, *Sanctions: The Federal Law of Litigation Abuse* § 5(D)(2)(c), at 71-72 (1989); *Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1185 (9th Cir. 1988).

2. On February 7, 1992, the district court denied USAA's motion to dismiss and continued under advisement the Waters' motion for sanctions. First, the district court declined to apply the Supreme Court's holding in *Carden v. Arkoma Associates*, 494 U.S. 185, 195-96 (1990), that "diversity jurisdiction in a suit by or against [an artificial] entity depends on the citizenship of 'all the members.' " (citation omitted). Instead, the court applied the Supreme Court's sixty-year-old decision in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933), which held that a Puerto Rican entity known as a *sociedad en comandita* could be treated as a citizen of Puerto Rico for purposes of determining federal court jurisdiction. Based on *Russell*, the district court determined that the question before it was "whether USAA has sufficient corporate traits to be within the *sociedad en comandita's* 'corporate' boundaries." Order at 3. Noting that "USAA is a statutory entity governed by very specific Texas insurance laws," and that, for a variety of purposes, "federal laws treat USAA in a corporate manner," the court answered that question in the affirmative. *See id.* at 4.

Next, the district court acknowledged that *Carden* appeared to prohibit courts from "look[ing] beyond the incorporated/unincorporated dichotomy and study[ing] the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue to determine diversity of citizenship." 494 U.S. at 190; *see* Order at 2-3. The court also conceded that the Supreme Court's decision in *United Steelworkers v. Bouligny*, 382 U.S. 145 (1965), which " 'considered and rejected applying *Russell* beyond its facts,' " Order at 3

(quoting *Carden*, 494 U.S. at 190 n.2), "appeared to undercut *Russell*." *id.* at 5. But the district court nonetheless concluded that "*Carden* makes it clear that *Russell* still has precedential value" and that *Russell*'s functional approach to determining an entity's jurisdictional status "must be considered in any analysis of an association as a juridical person." *Id.*

Finally, the district court stressed that it was "not unmindful" that the Second Circuit in *Baer v. United Services Auto. Ass'n* and the Tenth Circuit in *Tuck v. United Services Auto. Ass'n* had reached contrary conclusions about USAA's status for diversity purposes. *See id.* at 5. The court purported to distinguish these cases, however, on the grounds that they were "pre-*Carden*, relied on *Bouligny* and did not discuss *Russell*." *id.* On February 7, 1992, the court also ordered discovery on the sanctions issue and the merits of the Waters' claims, set a May 11, 1992, date for a hearing on the sanctions motion, and a September 14, 1992 date for a trial on the merits.

On February 11, 1992, USAA filed a motion in the district court seeking certification of the Order pursuant to 28 U.S.C. § 1292(b) (1988) and a stay of discovery. The Waters opposed both motions on February 25, 1992. In their opposition, the Waters argued that USAA's request for permission to appeal should be denied because USAA's effort to seek interlocutory review was somehow inappropriate. They urged that USAA's motion was "a slap in the face to the Ninth Circuit," Pl. Cert. Opp. at 1 (Tab 15), and a "cunning effort to waste . . . judicial time and resources," *id.* at 2 (Tab 15), which is "outrageous, unjustifiable and itself a basis for sanctions," *id.* at 4 (Tab

15).[5] The plaintiffs did not cite *Carden* in their opposition or explain how the district court's position could possibly be consistent with that case. The district court denied USAA's certification and stay motions on February 28, 1992, and reset the sanctions hearing for May 14 and the trial for June 22, 1992. The court ordered that USAA begin producing material in response to discovery by March 16, 1992. (The text of the court's latest order has not yet been released.)

ARGUMENT

Although a writ of mandamus is an extraordinary remedy, it may in certain circumstances, serve as " 'an expeditious and effective means of confining the inferior court to a lawful exercise of its prescribed jurisdiction.' " *Mafnas v. United States District Court*, 919 F.2d 101, 103 (9th Cir. 1990), *appeal dismissed*, 936 F.2d 1068 (9th Cir. 1991) (quoting *People of Guam v. District Court*, 641 F.2d 816, 820 (9th Cir. 1981)). This Court consults five guidelines to determine whether mandamus is appropriate in a particular case:

1) whether the petitioner has no other means such as an appeal, to obtain the desired relief;

2) whether petitioner will be damaged or prejudiced in any way not correctable on appeal;

3) whether the district court is clearly erroneous as a matter of law;

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[5] The Waters also argued that "[t]his is a case where USAA 'low-balled' the wrong folks." *Id.* at 7 (Tab 15).

4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules;

5) whether the district court's order raises new and important problems or issues of first impression.

Mortgages, Inc. v. United States District Court, 934 F.2d 209, 211 (9th Cir. 1991); *see Bauman v. United States District Court*, 557 F.2d 650, 654-55 (9th Cir. 1977). "No single factor is determinative, and all five factors need not be satisfied at once." *Valenzuela-Gonzalez v. United States District Court*, 915 F.2d 1276, 1279 (9th Cir. 1990) (internal citation omitted). Consultation of the five guidelines here confirms that USAA's petition warrants mandamus relief directing the district court to dismiss the complaint for want of jurisdiction.

I. The District Court's Determination That USAA Should Be Treated As A Corporate Citizen Of The State Of Texas Was Clearly Erroneous As A Matter Of Law

" 'The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.' " *Mallard v. United States District Court*, 490 U.S. 296, 308 (1989) (citation omitted). The district court here refused to apply the Supreme Court's holding in *Carden v. Arkoma Associates*, 494 U.S. 185, 195 (1990), that a court should, " 'without analysis of the particular entity before it, count every member of an unincorporated association for purposes of

diversity jurisdiction.' " (Citation omitted). Instead, in exercising diversity jurisdiction over USAA, the court relied solely on the Supreme Court's sixty-year-old decision in *Puerto Rico v. Russell & Co.*, 288 U.S. 476 (1933). The Supreme Court's decisions in both *Carden* and *United Steelworkers v. Bouligny*, 382 U.S. 145 (1965), however, clearly foreclose the district court's reliance on *Russell*.

In *Russell*, the Supreme Court determined the citizenship of a *sociedad en comandita*, an entity organized under the civil code of Puerto Rico, in order to decide whether a case could be removed from a Puerto Rican court to federal court. *See* 288 U.S. at 477-78. Under the Organic Act of Puerto Rico, federal jurisdiction existed if parties on either side of a controversy were citizens of a foreign state or "citizens of a State, Territory or District of the United States not domiciled in Puerto Rico." *Id.* at 478. All members of the *sociedad* resided outside of Puerto Rico. The Court, however, determined that the *sociedad* itself, rather than its members, was the party to the action. The Court reached this conclusion only after examining the *sociedad*'s structure and operations and determining that the *sociedad* had a number of corporate-like attributes. Accordingly, because the Court decided to treat the *sociedad* as a corporate citizen of Puerto Rico, under whose laws it was organized, the Court held that the case could not be removed to federal court. *See id.* at 480-82.

The *Russell* Court made clear that its holding was limited to the peculiar facts of that case. Acknowledging that "[t]he tradition of the common law is to treat as legal persons only incorporated groups and to assimilate all others to partnerships," *id.* at 480 (citation omitted), the

Court then stated that "[t]he tradition of the civil law, *as expressed in the Code of Puerto Rico,* is otherwise," *id.* (emphasis added). After deciding to treat *sociedads* like corporations for jurisdictional purposes, the Court further emphasized that the effect of its holding was to contract federal jurisdiction because "non-residents of Puerto Rico, who ha[d] taken advantage of its laws to organize a juridical entity for the purpose of carrying on business there, [could no longer] remove from the [Puerto Rican courts] controversies arising under local law." *Id.* at 482.

Thus, by its own terms, *Russell* stands for the limited proposition that foreign, unincorporated civil-law entities may, in some cases, be treated like corporations for jurisdictional purposes. That *Russell*'s applicability is so limited was stated unambiguously in both *Bouligny* and *Carden.*

In *Bouligny,* the Supreme Court determined the citizenship for diversity purposes of an unincorporated labor association. The Court first acknowledged its longstanding rule that a corporation should be treated as a citizen of its incorporating State. *See* 382 U.S. at 148. But, the court noted that in *Chapman v. Barney,* 129 U.S. 677 (1889), it had declined to extend that rule to unincorporated entities – in that case, a joint stock company. *See id.* at 149. Next, the Court considered arguments that "many voluntary associations and labor unions are indistinguishable from corporations in terms of the reality of function and structure," *id.* at 150, but concluded that it was not the appropriate body to evaluate these policy

arguments. Thus, the Court held that the labor association's citizenship was that of each of its members. *See id.* at 150-53.

Twenty-five years later in *Carden*, the Court considered the citizenship of a limited partnership. The Court observed that in *Bouligny*, it had "reiterated that 'the doctrinal wall of *Chapman v. Barney*' would not be breached." 494 U.S. at 189 (citation omitted). Elaborating on *Bouligny*, the *Carden* Court held broadly that the "wide assortment of artificial entities," *id.* at 197, that "[t]he 50 States have created, and will continue to create," *id.*, must be measured by the citizenship of each of their members:

> In sum, we reject the contention that to determine for diversity purposes, the citizenship of an artificial entity, the court may consult the citizenship of less than all of the entity's members . . . . [Rather,] a suit by or against the entity depends on the citizenship of "all the members."

Id. at 195 (citation omitted); *see id.* at 199 (O'Connor, J., dissenting) (criticizing the majority's "newly formulated rule that the court will, without analysis of the particular entity before it, count every member of an unincorporated association for purposes of diversity jurisdiction.").

In explaining why it had rejected *Carden*'s bright-line rule in favor of *Russell*'s functional approach, the district court reached the untenable conclusion that "[in *Carden*,] the Supreme Court did not draw [a] black and white line of jurisdictional status simply based upon the label corporate or non-corporate entity," but, instead, "specifically distinguished" *Russell*. *See* Order at 2-3. The district court thus read *Carden* as standing for the exact opposite of its

clear holding. In the district court's view, *Carden* had not only endorsed *Russell*'s functional approach but had "ma[de] it clear" that *Russell* "must be considered in any analysis of an association as a juridical person." *See id.* at 5. The district court's conclusion completely misses the mark.

Neither *Bouligny* nor *Carden* endorsed the *Russell* Court's functional approach to determining an entity's jurisdictional status. The *Bouligny* Court explicitly stated that "*Russell* does not furnish [a] precedent" for courts to analyze the structure and operations of a wide array of unincorporated, artificial entities. *See* 382 U.S. at 151. On the contrary, the Court stressed, all "pleas for extension of the diversity jurisdiction to hitherto uncovered broad categories of litigants ought to be made to the Congress and not to the courts." *Id.* at 150-51. In *Carden*, the Court flatly rejected the argument that *Russell*

> "reflec[ts] the Supreme Court's willingness to look beyond the incorporated/unincorporated dichotomy and to study the internal organization, state law requirements, management structure, and capacity or lack thereof to act and/or sue, to determine diversity of citizenship."

494 U.S. at 190 (citation omitted). "The problem with this argument lies not in its logic," according to the Court, "but in the fact that the approach it espouses was proposed and specifically rejected in *Bouligny*." *Id.*

Indeed, read together, both *Bouligny* and *Carden* have expressly limited *Russell's* applicability to entities formed under civil law. In *Bouligny*, the Court stressed that "[t]he problem which [*Russell*] presented was that of fitting an exotic creation of the civil law, the *sociedad en comandita*,

into a federal scheme which knew it not." 382 U.S. at 151. The *Carden* Court expanded on *Bouligny's* explanation, holding that:

> There could be no doubt, after *Bouligny*, that at least all common-law entities (and likely all entities beyond the Puerto Rican *sociedad en comandita*) would be treated for purposes of the diversity statute pursuant to what *Russell* called "[t]he tradition of the common law," which is "to treat as legal persons only incorporated groups and to assimilate all others to partnerships."

494 U.S. at 190; *see id.* at 208-09 (O'Connor, J., dissenting) (criticizing majority's "holding that an association within the continental United States is not afforded the same treatment as its virtually identical Puerto Rican counterpart"). The district court's conclusion that *Russell*, although "undercut" by *Bouligny*, was somehow revived in *Carden* is thus wholly unfounded. *Carden* states clearly that outside the civil law context – and "likely" beyond its peculiar facts – *Russell* has no precedential effect.

Controlling law in this Circuit also requires that USAA's citizenship be determined by *Carden's* and *Bouligny's* bright-line rule rather than by *Russell's* functional approach. This Court has consistently acknowledged the general rule that the citizenship of unincorporated associations is determined by the citizenship of their members. In *Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group*, 823 F.2d 302, 303-04 (9th Cir. 1987), for example, a "group of independent insurance companies" relied on diversity jurisdiction to remove a case to federal court. This Court raised the

jurisdictional issue sua sponte and held that since the insurance companies were operating as "an unincorporated association," the case must be dismissed for lack of subject matter jurisdiction because "[a]ll members of an unincorporated association must be diverse from the opposing party." *Id.* at 304; *accord Faysound Ltd. v. United Coconut Chems., Inc.*, 878 F.2d 290, 292 (9th Cir. 1989) (citing *Rockwell*); *O'Halloran v. Univ. of Wash.*, 856 F.2d 1375, 1381 (9th Cir. 1988) (citing *Rockwell*); *Otero v. Int'l Union of Elec., Radio & Machine Workers*, 474 F.2d 3, 4 (9th Cir. 1973) (per curiam) (citing *Bouligny*).[6] This Court has also recognized that *Russell* only applies to civil law entities. Indeed, in *Cohn v. Rosenfeld*, 733 F.2d 625, 628-29 (9th Cir.), *cert. denied*, 469 U.S. 932 (1984), this Court emphasized the *Russell* Court's distinction between " 'the tradition of the common law' . . . [and] the more diverse tradition of the civil law as expressed in the Code of Puerto Rico," *id.* at 628-29 (citation omitted), before applying *Russell* to the civil-law entity at issue in that case (an anstalt organized under the laws of Liechtenstein, a civil law country).

That *Russell* lacks any precedential force in the present context is made even more clear in the Fifth Circuit's recent decision in *Newport Ltd. v. Sears, Roebuck & Co.*, 941 F.2d 302 (5th Cir. 1991), *cert. denied*, 1992 U.S. LEXIS 1299 (U.S. 1992). In *Newport Ltd.*, the court decided the citizenship for diversity purposes of Newport Limited, a Louisiana partnership in commendam. Pointing out the parallel

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[6] *Rockwell* was subsequently overruled "to the extent that [it] authorize[d] sanctions on appeal under Rule 11." *Partington v. Gedan*, 923 F.2d 686, 688 (9th Cir. 1991) (per curiam).

civil-law origins of the Puerto Rican *sociedad en comandita* and the Louisiana partnership in commendam, Sears had argued that, like the *sociedad*, the Louisiana partnership should be treated as a juridical person. The Fifth Circuit disagreed, noting that "*Carden* . . . essentially forecloses the characteristic-by-characteristic inquiry which Sears would have us undertake today." *Id.* at 306. The Fifth Circuit further concluded:

> We must agree with the observation of the trial court "that Louisiana, while enjoying a civilian tradition, is one of the United States. The fact that a Louisiana partnership in commendam derives from a civilian code provides no other reason for treatment different from other American limited partnerships." *We find little support for the suggestion that [in Russell] the Supreme Court intended an exception for any entity other than a sociedad en comandita,* especially for one which on its face is indistinguishable from an ordinary limited partnership.

Id. at 307 (citation omitted) (emphasis added in part); *see also Temple Drilling Co. v. Louisiana Ins. Guar. Ass'n*, 946 F.2d 390, 394 (5th Cir. 1991) (observing that in *Carden*, the Supreme Court rejected the argument that "*Russell* reflects the Court's willingness to look behind the incorporated/unincorporated dichotomy" in some cases).[7]

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[7] Other courts, including a judge in the Central District of California, have also construed *Carden* broadly. *See, e.g., Danjag, S.A. v. MGM/UA Communications Co.*, 773 F. Supp. 194, 198 (C.D. Cal. 1991) ("In *Carden*, the Supreme Court noted that the corporation remains *the one artificial entity* in our law whose citizenship, for jurisdictional purposes, is determined without

(Continued on following page)

Finally, with respect to USAA in particular, two courts of appeals have already held that, for diversity purposes, USAA's citizenship is that of its members. In *Baer v. United Services Auto. Ass'n*, 503 F.2d 393, 395 (2d Cir. 1974), the Second Circuit found the "formal distinction drawn between the insurance reciprocal and the insurance corporation under state law . . . dispositive on the issue of whether the reciprocal should be considered a corporation for diversity purposes." The Tenth Circuit, in *Tuck v. United Services Auto. Ass'n*, 859 F.2d 842 (10th Cir. 1988), *cert. denied*, 489 U.S. 1080 (1989), likewise held that it lacked diversity jurisdiction over USAA because " 'the citizenship of an unincorporated association is the citizenship of the individual members of the association.' " *Id.* at 844. (citation omitted) Indeed, since the Supreme Court decided *Carden*, all of the other courts that have ruled on USAA's jurisdictional status have held that they cannot exercise diversity jurisdiction over claims involving USAA. *See, e.g., Pennington v. Hartford Casualty Ins. Co. (and United Services Auto. Ass'n)*, No. 91-614-S (E.D. Okla. Jan. 29, 1992); *Byrne v. USAA Property & Casualty Ins. Co.*, Civ. No. 91-2028 (E.D. Pa. July 18,

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reference to the identity or character of its owners") (emphasis added); *Penteco Corp. v. Union Gas Sys., Inc.*, 929 F.2d 1519, 1523 (10th Cir. 1991) (noting that "*Carden* held that for entities other than corporations (and sometimes trusts), diversity jurisdiction . . . depends on the citizenship of 'all the members' ") (citation omitted); *RLI Ins. Co. v. United States Aviation Underwriters*, 739 F. Supp. 1219, 1221 (N.D. Ill. 1990) (noting that in *Carden*, "the Supreme Court held that the citizenship of every member of an unincorporated entity must be considered for diversity purposes.").

1991); *Liberty Mutual Ins. Co. v. Brasby & United Services Auto. Ass'n*, Civ. No. 90-8447 (S.D. Fla. Apr. 30, 1991).[8]

Accordingly, both controlling Supreme Court and Ninth Circuit precedent, and persuasive authority in other circuits dictate that because USAA is an unincorporated entity that is not a creature of civil law, its citizenship for diversity purposes is the citizenship of each of its members. The district court's contrary holding flies in the face of this binding and unambiguous authority. This Court thus should issue a writ of mandamus to correct the district court's clearly erroneous jurisdictional determination. *See. e.g., Borja v. United States District Court*, 919 F.2d 100, 101 (9th Cir. 1990) (holding that mandamus was appropriate because a statute had eliminated the lower court's jurisdiction over the case); *Mafnas v. United States District Court*, 919 F.2d at 102 (same); *People of Guam v. District Court*, 641 F.2d at 820-21 (same).

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[8] In their opposition to USAA's certification and stay motions in the district court, the Waters argued that USAA's jurisdictional status did not present "simply 'a question of law' " because "the issue of jurisdiction has an inherent factual underpinning." Pl. Cert. Opp. at 4-5 (Tab 15). Similarly, they contended that other courts that have ruled on "the jurisdictional issue" have not considered "the effect of the changes in Texas corporation law which expressly defines a reciprocal insurance exchange as a corporation." *Id.* at 6 (Tab 15). As USAA pointed out in its Supplemental Brief In Support Of Its Motion To Dismiss in the district court, however, the current Texas statutes clearly distinguish between corporations and reciprocal inter-insurance exchanges. *See* Def. Supp. Br. at 5-14 (Tab 11). Moreover, the district court's opinion does not declare *Carden* inapplicable because USAA is a corporation under Texas law, but, instead, because USAA has a "corporate-like personality." *See* Order at 4.

II. Mandamus Is Appropriate Because The District Court's Erroneous Order Could Adversely Affect The Efficient Operation Of The District Courts

Mandamus is particularly necessary in this case because the district court's erroneous holding could significantly disrupt the administration of justice in this Circuit. In *Arizona v. United States District Court (In re Cement Antitrust Litig.)*, 688 F.2d 1297, 1303-04 (9th Cir. 1982), *aff'd for lack of quorom*, 459 U.S. 1191 (1983), this Court explained that mandamus relief is often appropriate when the challenged order "implicate[s] the duty of appellate courts to exercise supervisory control of the district courts in order to insure proper judicial administration." Accordingly, since *In re Cement*, this court has not hesitated to issue writs of mandamus under its supervisory authority. In *Mortgages, Inc. v. United States District Court*, 934 F.2d 209 (9th Cir. 1991), for example, qui tam plaintiffs in a False Claims Act action sought a writ of mandamus ordering the district court to dismiss counterclaims filed against them. The Court observed:

> [T]he issue of whether counterclaims may be filed against qui tam plaintiffs is one that may confront a number of district court judges. In 1986, Congress substantially amended the FCA with the intent of encouraging such actions. At least one commentator has indicated these amendments will result in an increased filing of FCA lawsuits. A ruling from this court on this issue at this time will increase the efficient operation of the district courts.

Id. at 212 (citation omitted). After determining that the district court's denial of petitioners' motion to dismiss

was clearly erroneous, this Court granted the petitioners' request for a writ of mandamus. *See also Valenzuela-Gonzalez v. United States District Court*, 915 F.2d at 1279 (mandamus was appropriate, in part, because legal error was "likely to be 'oft-repeated' "); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296 (9th Cir. 1984) (granting petition for mandamus, in part, because resolution of a discovery dispute "would substantially aid the administration of justice").

This case is the quintessential candidate for this Court's exercise of its supervisory authority. The district court's decision, if allowed to stand, could have serious, adverse consequences on the efficient administration of this Circuit's district courts. The decision below has already created a conflict within this Circuit as to the appropriateness of applying a functional approach in determining the citizenship of non-corporate entities. *See* note 8 *supra*. Numerous district courts may determine the jurisdictional status of unincorporated entities before this Court has the opportunity to review the district court's jurisdictional determination in this case. Indeed, with more than 15,000 cases on its docket, USAA itself may soon have its jurisdictional status determined again by a number of district courts in the Circuit.[9] Those courts that choose to endorse the district court's rationale in this case

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[9] Indeed, in *United Services Auto. Ass'n v. Hawaiian Ins. & Guar. Co.*, Civ. No. 84-0300 (D. Haw.), a defendant sought to vacate a final judgment in a diversity action commenced by USAA and an award of sanctions on the theory that the district court lacked diversity jurisdiction.

would subject many unincorporated associations, including USAA, to the plainly incorrect functional analysis that the district court espouses. The result would be the different treatment of like entities in different district courts and an inevitable increase in the numbers of appeals to this Court. A writ of mandamus in this case thus would prevent this unnecessary dedication of federal judicial resources to the resolution of state law claims that must be brought in state court.

III. Mandamus Is Necessary To Prevent USAA From Suffering Harm That Could Not Be Redressed On Appeal

Finally, this Court should grant USAA's petition because mandamus is the only appropriate remedy for the district court's refusal to follow controlling precedent. "[T]o insure that mandamus, rather than some other form of relief, is the appropriate remedy[,]" this Court generally requires that "petitioners . . . demonstrate that they have no other adequate means of obtaining the relief desired and that they will be damaged in a way not correctable on appeal from final judgment." *In re Cement Antitrust Litigation*, 688 F.2d at 1301. USAA's petition satisfies both requirements. First, because the district court has denied USAA's section 1292 motion, USAA has no other means of obtaining interlocutory relief from the Order. *See, e.g., Valenzuela-Gonzalez v. United States District Court*, 915 F.2d at 1270. Moreover, absent interlocutory relief, USAA would be subject to conflicting legal requirements throughout the proceedings below and until this Court renders a final decision on appeal. With its voluminous docket, USAA should not be required to

function under an uncertain jurisdictional regime for such a protracted period of time.

Although this Court has generally rejected the " 'position that the costs of trying massive civil actions render review after final judgment inadequate,' " *In re Cement Antitrust Litigation*, 688 F.2d at 1303 (quoting *American Crystal Sugar Co. v. United States District Court (In re Sugar Antitrust Litigation)*, 559 F.2d 481, 484 (9th Cir. 1977)), it has also recognized that mandamus relief may be justified when a party will suffer hardship that is " 'substantially in excess of the usual inconvenience of an unnecessary trial.' " *Varsic v. United States District Court*, 607 F.2d 245, 252 (9th Cir. 1979) (quoting *Pacific Car & Foundry Co. v. Pence*, 403 F.2d 949, 953 (9th Cir. 1968)); see also *Washington Pub. Utils. Group v. United States District Court*, 843 F.2d 319, 325 (9th Cir. 1987) ("[m]andamus relief may be justified if a party will suffer severe prejudice, as the result of inevitable delay and increased costs in being forced to undergo an unnecessary trial that is not correctable on appeal."). The substantial prejudice to USAA of having to manage its 15,000-case docket without knowing whether it must submit to federal diversity jurisdiction more than satisfies this Court's injury requirement for mandamus relief.[10]

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[10] Moreover, where, as here, the district court's Order would seriously disrupt the efficient administration of justice in this Circuit, "the degree of injury to the petitioner is a less critical factor." *In re Cement Antitrust Litigation*, 688 F.2d at 1303; *see also Mortgages, Inc. v. United States District Court*, 934 F.2d at 211 (granting mandamus even though "the fact that the

(Continued on following page)

As the district court recognized, both the Second Circuit in *Baer v. United Services Automobile Ass'n*, 503 F.2d at 396, and the Tenth Circuit in *Tuck v. United Services Automobile Ass'n*, 859 F.2d at 845, have held that, under Texas law, USAA is an unincorporated association and thus a citizen of every state in which it has members. The *Tuck* court went even further, however. That court observed that, on a number of occasions, "USAA [had] appeared in federal courts under their diversity jurisdiction, even after the decision in *Baer*." *Id.* at 845 n.3. It then warned that: "Because USAA has apparently 'rediscovered' Baer . . . and asked us to dismiss this action for lack of subject matter jurisdiction, we expect it to make similar motions in all pending diversity litigation." *Id.* In addition, the court directed the district court to consider the need for sanctions against USAA and/or its attorneys for failing to file a motion to dismiss earlier in the proceedings. *See id.* at 846.

Although the parties ultimately settled the case in *Tuck*, USAA took numerous measures to comply with the Tenth Circuit's strongly-worded admonition. As the attached report details, USAA issued a series of memoranda to its claims attorneys, supervisors, and outside counsel notifying them of the *Tuck* decision and warning them in no uncertain terms to stay out of federal court in diversity litigation. *See Report On Measures Undertaken To Insure That United Services Automobile Association, As An*

(Continued from previous page)

lower court's order [would] result in additional cost and unreasonable delay [ordinarily would] not demonstrate sufficient prejudice to warrant mandamus relief").

Entity, Will Not Be A Party In Federal Court Actions Based On Diversity Of Citizenship (submitted on December 10, 1990 to the United States Court of Appeals for the Tenth Circuit in connection with *Tuck v. United Service Auto. Ass'n*, Nos. 90-5009 et al.) (Tab 2). In an effort to manage its docket more closely, USAA asked all counsel to identify any federal diversity cases in which USAA continued to appear as a party. USAA further warned its attorneys to stay out of federal diversity litigation by including the topic, "USAA As A Defendant In Federal Court," in its legal conferences, placing inserts in its Litigation Manual, and including notices in case files sent to local counsel.

The district court's denial of USAA's motion to dismiss, however, once again introduces uncertainty into the law governing unincorporated associations, like USAA. Outside the Second and Tenth Circuits, attorneys representing USAA in potential diversity litigation must now either ignore the Tenth Circuit's direction to forego all federal diversity litigation, or acquiesce in the district court's holding here that such litigation is appropriate. Neither choice is tenable. *Cf. Christensen v. United States District Court*, 844 F.2d 694, 697 (9th Cir. 1988) (granting mandamus where "[i]f Christensen and his attorney elected to defy the order [disqualifying the attorney] and then pursue a direct appeal, they would be subject to contempt sanctions and disciplinary action for ethical violations."). Moreover, parties opposing USAA in litigation will seize upon the district court's opinion as justification for improperly bringing or removing state law claims in the federal courts. These actions would substantially increase costs for all parties involved. Indeed, in

this case, it appears that the plaintiffs seek to take advantage of the costs to USAA of vindicating its jurisdictional position after trial, for they urge that having tried the matter in federal courts, "the likelihood that USAA would retry the entire action rather than settling is virtually nonexistent." Pl. Cert. Opp. at 5 (Tab 15). While USAA has no intention of abandoning its jurisdictional position, it should not be forced to undergo a useless trial in this matter to vindicate a position which is clearly correct.

Because it has been criticized harshly for acting inconsistently, USAA has an unusually compelling need for clear legal guidance from the federal courts. After *Carden*, this clear legal guidance existed until the court below decided single-handedly to resuscitate *Russell*. By correcting the district court's error of law on mandamus, this Court would ensure that USAA could continue consistently to adhere to its post-*Tuck* litigation policies (and therefore *Carden's* bright-line rule).

CONCLUSION

For the foregoing reasons, USAA requests that this Court issue a writ of mandamus ordering the district court to dismiss the complaint in *Waters v. United Services Automobile Association*, Civ. No. 91-3615 (C.D. Cal.).

STATEMENT OF RELATED CASES

USAA is unaware of any related case pending in this Court.

Respectfully submitted,

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Counsel for Petitioner United Services Automobile Association

February 28, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 1992, I caused to be served one copy of the foregoing Petition For A Writ of Mandamus Or Other Appropriate Relief by hand upon:

William M. Shernoff, Esq.
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Claremont, California 91711-5498

Clerk of the Court
United States District Court for
the Central District of California
312 North Spring Street
Los Angeles, California 90012

and by Federal Express upon:

The Honorable Wm. Fremming Nielsen
United States District Court for the
Eastern District of Washington
938 United States Courthouse
Spokane, Washington 99210-2208

/s/ Laurie F. Calder
Laurie F. Calder, Esq.

Counsel for Petitioner United
Services Automobile Association

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED SERVICES AUTOMOBILE ASSOCIATION,	)	DOCKETED ORIGINAL 92-70122
Petitioner,	)	(Filed February 28, 1992)
v.	)	
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,	)	
Respondent,	)	
and	)	
LAUGHLIN E. WATERS AND VOULA D. WATERS,	)	
Real Parties in Interest.	)	

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR A STAY PENDING REVIEW OF A
PETITION FOR A WRIT OF MANDAMUS
OR OTHER APPROPRIATE RELIEF

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CIRCUIT RULE 27-3 CERTIFICATE

I. The attorneys for the parties in this case are:

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II. Simultaneously with this Emergency Motion, United Services Automobile Association ("USAA") has filed a Petition For A Writ Of Mandamus Or Other Appropriate Relief requesting that this Court order the

United States District Court for the Central District of California to dismiss *Waters v. United Services Automobile Ass'n*, No. 91-3615 (C.D. Cal.), for lack of subject matter jurisdiction. Sitting by designation in the Central District of California, Judge Nielsen of the United States Court of Appeals for the Eastern District of Washington has ordered discovery in the case and USAA is currently required to file its initial discovery responses by March 16, 1992. USAA seeks this emergency stay to avoid having to participate in any district court proceedings in this case until this Court rules on USAA's Petition For A Writ Of Mandamus.

III. Earlier today, USAA notified counsel for the real parties in interest, the Clerk of the United States District Court for the Central District of California, and Judge Nielsen that USAA planned to file this Motion this afternoon. USAA has served copies of this Motion and the Petition (not including the appendix) by facsimile on the United States District Court for the Central District of California, counsel for the real parties in interest, and on Judge Nielsen. The Motion and Petition are also being hand-served on the United States District Court for the Central District of California and counsel for the real parties in interest, and served by Federal Express on Judge Nielsen.

Corporate Disclosure Statement

None of United Services Automobile Association's subsidiaries or affiliates issues shares to the general public. However, the following mutual funds offered by USAA Investment Management Company trade on the

New York Stock Exchange: Aggressive Growth Fund; Growth Fund; International Fund; Gold Fund; Income Stock Fund (stocks); Income Fund (bonds); GNMA Certificates; Money Market Fund; Treasury Money Market Trust; Tax Exempt Money Market Fund; State Money Market Fund; High Yield Fund; Intermediate Term Fund; Short Term Fund; State Bond Fund; Cornerstone Fund; and Balanced Portfolio Fund.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner,

v.

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

and

LAUGHLIN E. WATERS AND VOULA D. WATERS,

Real Parties in Interest.

EMERGENCY MOTION UNDER CIRCUIT RULE 27-3
FOR A STAY PENDING REVIEW OF A
PETITION FOR A WRIT OF MANDAMUS
OR OTHER APPROPRIATE RELIEF

Pursuant to Rules 8, 21, and 27 of the Federal Rules of Appellate Procedure and Section 1651 of Title 28 of the United States Code, petitioner United Services Automobile Association ("USAA") respectfully requests that this Court stay further proceedings in *Waters v. United Services Automobile Ass'n*, Civ. No. 91-3615 (C.D. Cal.), pending review and disposition of a Petition For A Writ Of Mandamus Or Other Appropriate Relief ("Petition") filed simultaneously herewith. A stay was sought in the district court and denied earlier today. Pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure and Circuit Rule 27-3, USAA respectfully requests that this Court (a) request an immediate response to this motion from the real parties in interest and (b) rule on this motion on or before March 16, 1992, when petitioner must begin producing material in response to discovery in this case. The grounds to support of this motion, which were all submitted to the district court, are as follows:

1. Petitioner USAA is a reciprocal inter-insurance exchange, which is licensed in the State of Texas but has members in every State.

2. On July 5, 1991, plaintiffs, Hon. Laughlin E. Waters, a sitting judge on the United States District Court for the Central District of California, and his wife, Voula D. Waters, filed suit against USAA in the United States District Court for the Central District of California. The Waters alleged that USAA had breached its duty of good faith and fair dealing under a homeowner's insurance policy by failing to offer adequate reimbursement for the damages that their home had sustained in a fire. They invoked the court's diversity jurisdiction on the grounds

that they are citizens of the State of California and USAA is a corporate citizen of the State of Texas.

3. On July 26, 1991, USAA moved to dismiss the Waters' complaint on the ground that the district court lacks diversity jurisdiction over the case because USAA is an unincorporated association with members in the State of California.

4. On September 9, 1991, the Chief Judge of this Court appointed Judge Laughlin E. Waters (sic) from the Eastern District of Washington to hear this case, since all of the district court judges in the Central District had disqualified themselves.

5. The Waters opposed USAA's motion to dismiss on October 15, 1991, and requested that the district court award sanctions in the amount of $1.72 million for USAA's actions in seeking to dismiss this case from federal court.

6. On February 7, 1992, the district court denied USAA's motion to dismiss and continued under advisement the Waters' motion for sanctions. *See Waters v. United Services Automobile Ass'n*, Civ. No. 91-3615 (C.D. Cal. Feb. 7, 1992) ("Order"). The court also ordered discovery on the sanctions issue and the merits of the Waters' claims, set a May 11, 1992 date for a hearing on the sanctions motion, and a September 14, 1992 date for a trial on the merits.

7. On February 11, 1992, USAA filed a motion in the district court seeking certification of the Order pursuant to 28 U.S.C. § 1292(b) and a stay of discovery. The Waters opposed both motions on February 25, 1992, and the

district court denied them in a telephone conference earlier today. The court denied USAA's certification motion on the ground that this was not an extraordinary case. The court did not separately state its reasons for denying the stay. The court also reset the sanctions hearing for May 14 and the trial for June 22, and ordered that USAA begin producing material in response to discovery by March 16, 1992. (The text of the court's decision is not presently available but will be supplied to this Court promptly upon its release.)

8. This Court is specifically authorized to "issue a stay or injunction pending further consideration of [a] petition [for a writ of mandamus]", *see* Circuit Rules 21-1 to 21-4 Advisory Committee's Note, and has often exercised this authority to preserve the status quo in the district court, *see, e.g., Sunshine Beauty Supplies, Inc. v. United States District Court*, 872 F.2d 310, 311 (9th Cir. 1989); *Arthur Young & Co. v. United States District Court*, 549 F.2d 686, 690 (9th Cir.), *cert. denied*, 434 U.S. 829 (1977); *Kerr v. United States District Court*, 511 F.2d 192, 195 (9th Cir. 1975), *aff'd*, 426 U.S. 394 (1976).

9. In this circuit, "[t]he standard for evaluating stays . . . is similar to that employed by district courts in deciding whether to grant a preliminary injunction." *Lopez v. Heckler*, 713 F.2d 1432, 1435 (9th Cir.), *rev'd in part on other grounds*, 463 U.S. 1328 (1983). A movant is entitled to an order preserving the status quo in a particular case if it demonstrates " 'either (1) a combination of probable success on the merits and the possibility of irreparable injury or (2) that serious questions are raised and the balance of hardships tips sharply in its favor.' " *Tribal Village of Akutan v. Hodel*, 859 F.2d 662, 663 (9th Cir. 1988),

cert. denied, 493 U.S. 873 (1989) (quoting *Los Angeles Memorial Coliseum Comm'n v. NFL,* 634 F.2d 1197, 1201 (9th Cir. 1980), *cert. denied,* 469 U.S. 990 (1984)). Under these standards, USAA is clearly entitled to a stay of the district court's proceedings pending this Court's disposition of the Petition.

10. As explained more fully in the Petition, USAA has a strong likelihood of success on the Petition for a number of reasons. First, the district court made a clear error of law in determining USAA's citizenship for diversity purposes because the court declined to apply the Supreme Court's bright-line rule in *Carden v. Arkoma Associates,* 494 U.S. 185, 195 (1990), that a court should, " *'without analysis of the particular entity before it,* count every member of an unincorporated association for purposes of diversity jurisdiction.' " (emphasis added) (citation omitted). The court also declined to apply this Circuit's rule that the citizenship of an unincorporated association is that of its members, *see Rockwell Int'l Credit Corp. v. United States Aircraft Ins. Group,* 823 F.2d 302, 304 (9th Cir. 1987), and persuasive precedents in other Circuits holding with respect to this very defendant that diversity jurisdiction is not available, *see Baer v. United Services Automobile Ass'n,* 503 F.2d 393, 396 (2d Cir. 1974); *Tuck v. United Services Automobile Ass'n,* 859 F.2d 842, 845 (10th Cir. 1988), *cert. denied,* 489 U.S. 1080 (1989).

Second, the district court's Order requires this Court to exercise its supervisory mandamus authority, *see, e.g., Mortgages, Inc. v. United States District Court,* 934 F.2d 209, 212 (9th Cir. 1991), because, without clear guidance from this Court, numerous district courts in this Circuit could follow the district court's rationale in this case and

improperly exercise diversity jurisdiction over unincorporated associations, including USAA. The decision below has already created a conflict within this Circuit on this issue. *See* Petition for a Writ of Mandamus at 20 n. 7.

Third, USAA has no other means of obtaining interlocutory relief from the district court's Order because the district court denied USAA's section 1292(b) motion for certification.

Finally, absent interlocutory relief, USAA would suffer hardship " 'substantially in excess of the usual inconvenience of an unnecessary trial.' " *Varsic v. United States District Court*, 607 F.2d 245, 252 (9th Cir. 1979) (quoting *Pacific Car & Foundry*, 403 F.2d 949, 953 (9th Cir. 1968)). For an indefinite time period, USAA would have to manage its 15,000-case docket under the conflicting directions of the Tenth Circuit, which has directed USAA to move to dismiss all federal diversity litigation, *see Tuck v. United Services Automobile Ass'n*, 859 F.2d at 845 n.3, and the district court, which has ordered USAA to proceed in federal court. Moreover, parties opposing USAA in litigation will seize upon the district court's opinion as justification for improperly bringing state law claims in, or removing them to, the federal courts. These actions would substantially increase the costs for all parties involved.

11. The balance of hardships also tilts in favor of granting the stay because this Court's failure to preserve the status quo pending disposition of the Petition would irreparably harm USAA and would be contrary to the public interest. Unless stayed, the district court's opinion

will encourage counsel opposing USAA and other unincorporated entities to improperly bring state claims in, or remove them to, federal court. Those actions, as USAA has already stressed, would impose unnecessary costs on all involved. Moreover, allowing discovery or other proceedings pending review of the Petition would lead to "undue burden or expense" in this case, *see* Fed. R. Civ. P. 26(c), which would be contrary to the interests of both the parties and the public. Should this Court grant USAA's Petition, all of the parties' and the district court's time, efforts, and money would have been wasted, since the case then would be dismissed for lack of subject matter jurisdiction. Indeed, it appears that the plaintiffs seek to take advantage of the costs to USAA of vindicating its jurisdictional position after trial, for they urge that having tried the matter in federal court, "the likelihood that USAA would retry the entire action rather than settling is virtually nonexistent." Pl. Cert. Opp. at 5 (Appendix to Petition Tab 15). While USAA has no intention of abandoning its jurisdictional position, it should not be forced to undergo useless discovery and trial in this matter before it can reassert a position which is clearly correct.

12. Although the plaintiffs have urged that granting the Petition would not affect their right to sanctions and thus their right to a sanctions hearing, *see* Pl. Cert. Opp. at 3 (Appendix to Petition Tab 15), dismissal of the case would confirm the appropriateness of USAA's motion to dismiss, making an award of sanctions inappropriate. *See, e.g., Soules v. Kauaians for Nukolii Campaign Comm.*, 849 F.2d 1176, 1185 (9th Cir. 1988) (refusing to award Rule 11 sanctions where parties had not acted inappropriately in that proceeding); *Burull v. First Nat'l Bank of Minneapolis,*

831 F.2d 788, 790 (8th Cir. 1987) (same), *cert. denied*, 485 U.S. 961 (1988).

13. Finally, allowing discovery during this interim period would contravene the federal courts' policy of deferring or limiting discovery until such a potentially dispositive preliminary issue has been resolved. *See, e.g., Scroggins v. Air Cargo, Inc.*, 534 F.2d 1124, 1133 (5th Cir. 1976); *Brennan v. Local Union No. 639, Int'l Bhd. of Teamsters*, 494 F.2d 1092, 1100 (D.C. Cir. 1974); *Taylor v. Breed*, 58 F.R.D. 101, 108 (N.D. Cal. 1973); *Kelleher v. Omark Indus., Inc.*, 19 Fed. R. Serv. 2d 725, 727 (D. Mass. 1975). Accordingly, without a stay of all district court proceedings pending review of the Petition, the parties and the public interest would suffer the very harm that the filing of the Petition is designed to prevent.

14. By contrast, entry of a stay would not harm the plaintiffs. The future proceedings in the district court would not illuminate the issues that the Petition raises. Nor would a stay impose any undue burdens on the plaintiffs, because, in this case, they seek only to recover damages for USAA's alleged bad faith in handling their claim. Policy coverage would not be an issue in the proceedings because USAA already has agreed to pay for the reconstruction and repair of the damaged portions of the plaintiffs' home, and that work is almost complete.

15. Preserving the status quo would not unduly delay the proceedings in the court below. USAA has filed its Petition simultaneously with this motion, and is prepared to meet any schedule that this court establishes with respect to consideration of both this motion and the Petition. Accordingly, this Court can ensure that there

would be no undue delay resulting from the entry of an order staying the proceedings in the district court.

CONCLUSION

For the foregoing reasons, USAA respectfully requests that this Court stay all proceedings in *Waters v. United Services Automobile Ass'n*, Civ. No. 91-3615 (C.D. Cal.), pending review and disposition of USAA's Petition For A Writ Of Mandamus Or Other Appropriate Relief. Pursuant to Rule 27(a) of the Federal Rules of Appellate Procedure and Circuit Rule 27-3, USAA further requests that this Court (a) request an immediate response to this motion from the real parties in interest and (b) rule on this motion on or before March 16, 1992.

Respectfully submitted,

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Counsel for Petitioner United Services Automobile Association

February 28, 1992

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 1992, I caused to be served one copy of the foregoing Emergency Motion Under Circuit 27-2 for a Stay Pending review of a Petition for a Writ of Mandamus or other Appropriate Relief by hand upon:

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Clerk of the Court
United States District Court for
the Central District of California
312 North Spring Street
Los Angeles, California 90012

and by Federal Express upon:

The Honorable Wm. Fremming Nielsen
United States District Court for the
Eastern District of Washington
938 United States Courthouse
Spokane, Washington 99210-2208

/s/ Laurie F. Calder by srr
Laurie F. Calder, Esq.

Counsel for Petitioner United
Services Automobile Association

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between –

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title –

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

(As amended July 26, 1956, c. 740, 70 Stat. 658; July 25, 1958, Pub.L. 85-554, § 2, 72 Stat. 415; Aug. 14, 1964, Pub.L. 88-439, § 1, 78 Stat. 445; Oct. 21, 1976, Pub.L. 94-583, § 3, 90 Stat. 2891; Nov. 19, 1988, Pub.L. 100-702, Title II, §§ 201(a), 202(a), 203(a), 102 Stat. 4646.)

Federal Rules of Civil Procedure

Rule 11. Signing of Pleadings, Motions, and Other Papers; Sanctions

Every pleading, motion, and other paper of a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the party's pleading, motion, or other paper and state the party's address. Except when otherwise specifically provided by rule or statute, pleadings need not be verified or accompanied by affidavit. The rule in equity that the averments of an answer under oath must be overcome by the testimony of two witnesses or of one witness sustained by corroborating circumstances is abolished. The signature of an attorney or party constitutes a certificate by the signer that the signer has read the pleading, motion, or other paper; that to the best of the signer's knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation. If a pleading, motion, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party or parties the

amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

(As amended Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987.)

(5)

No. 91-1707

Supreme Court, U.S.
FILED
MAY 27 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

In re: UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner.

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS, PROHIBITION OR OTHER APPROPRIATE REMEDY TO THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

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SUPREME COURT NO. 91-1707

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

In re: UNITED SERVICES AUTOMOBILE ASSOCIATION, Petitioner

OPPOSITION TO PETITION FOR WRIT OF MANDAMUS, PROHIBITION OR OTHER APPROPRIATE REMEDY TO THE UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

TO THE HONORABLE JUSTICES OF THE UNITED STATES SUPREME COURT:

Respondents LAUGHLIN E. WATERS and VOULA D. WATERS hereby oppose Petition for Writ of Mandamus, Prohibition or Other Appropriate Relief of petitioner UNITED SERVICES AUTOMOBILE ASSOCIATION ("USAA"). USAA has failed to demonstrate that the extraordinary relief requested is necessary or that its remedy by appeal is inadequate. As such, the petition should be summarily denied and this matter permitted to proceed by normal means.

1.

INTRODUCTION

USAA has petitioned this Court for issuance of a Writ of Mandamus requiring the trial court to dismiss the complaint in this action. However, USAA's petition is woefully inadequate and fails to demonstrate any need for the extraordinary relief requested.

USAA claims that appeal after judgment in this action is insufficient protection because it would be subjected to conflicting jurisdictional determinations in the 15,000 lawsuits in which it is currently involved. However, USAA's disingenuous argument ignores the fact that the vast bulk of those 15,000 litigations are actions <u>against its insureds and not against USAA directly</u>.

Indeed, USAA's own employee testified at the sanction hearing on this matter, held on May 14 and 15, 1992, that less than 1,000 of the cases are brought against USAA directly. Thus, one of the very basic assertions made by USAA as a premise for extraordinary relief is false and groundless.

Additionally, USAA contends that it will be subjected to conflicting jurisdictional requirements in various circuits as the result of the District Court's ruling in this case which, USAA contends, conflicts with the rulings of the Second Circuit and the Tenth Circuit. Ironically, at the sanction motion, USAA's own expert on jurisdiction was asked if it was not inconsistent for USAA to be seeking to vacate a judgment entered against it in the Tenth Circuit

at the very same time that USAA was seeking to enforce a judgement in its favor in the Ninth Circuit. USAA's expert replied that such conduct was reasonable since there had been no determination in the Ninth Circuit of the jurisdictional issue. Although USAA is apparently not loathe to manipulate federal jurisdiction in its favor, it does not want to be compelled to subject itself to conflicting jurisdictional rulings when it is not in its own best interests.

As discussed in detail below, USAA's jurisdictional arguments are similarly without merit. Given that the District Court properly asserted diversity jurisdiction over USAA, and given that USAA has demonstrated no basis for the extraordinary relief requested, the

petition should be summarily denied and the issues reviewed, if at all, only after final judgment in this matter.

2.

THE DISTRICT COURT PROPERLY ASSERTED DIVERSITY JURISDICTION OVER USAA

USAA's petition follows USAA's well-established and traditional approach and presents a slanted, incomplete and misrepresentative argument in support of its petition for a writ of mandamus. USAA's petition challenges the trial court's use of the decision in Puerto Rico v. Russell & Co., 288 U.S. 476 (1933) by arguing that the rule in Carden v. Arkoma Associates, 494 U.S. 185 (1990) precludes a trial court's determination of whether an entity is a corporation or

an unincorporated association. Interestingly, USAA's petition only mentions in passing that it is accused of affirmatively asserting a basis for federal court diversity jurisdiction in numerous other cases. USAA does not disclose that for nearly twenty years it actually affirmatively invoked federal court diversity jurisdiction in numerous cases by asserting, under oath, that it was a corporation. (See, for example, A-241, A-251, A-255, A-261, A-282.) Only now, after engaging in bad faith conduct in the handling of the fire loss claim of a Federal Court judge, does USAA proclaim its "unincorporated association" status in order to escape the very same federal jurisdiction it has, for so long, invoked when to do so was to its own advantage.

Nor does USAA's petition mention the

fact that it has made judicial admissions of fact that it is a corporation. (See, for example, A-241, A-251, A-255, A-261, A-282.) Under the rule in Ferguson v. Neighborhood Housing Services, 780 F.2d 549, 551 (6th Cir. 1986), those judicial admissions of fact regarding USAA's corporate status, properly confer federal diversity jurisdiction on USAA. USAA will, undoubtedly, opine that subject matter jurisdiction cannot be admitted. However, a careful distinction must be drawn between the admission of jurisdiction and the admission of facts which confer jurisdiction.

> As noted in Ferguson, there is a "distinction between an admission that federal subject matter jurisdiction exists, and an admission of facts serving

> in part to establish federal subject matter jurisdiction. As the Supreme Court stated in an early case: 'Consent of parties cannot give the courts of the United States jurisdiction, but the parties may admit the existence of facts which show jurisdiction, and the courts may act judicially upon such an admission.' Railway Co. v. Ramsey, 89 U.S. 322, 327, 22 Wall. 322, 22 L.Ed. 823 (1874) . . . " (Emphasis added.)

Since USAA has judicially admitted that it is a corporation, that admission serves as a proper basis for determining that diversity jurisdiction exists. Not

only was USAA aware that the determination that it is a corporation for diversity purposes was made numerous times before, it knew that it had, itself, made the judicial admissions foundational to that determination and had, in fact, itself made the argument that diversity jurisdiction existed. (See, A-264 - A-277.)

Nor does USAA's petition mention that under Texas corporation law, USAA is defined as a corporation as so stated by the Legislature of Texas in enacting Article 1302-7.06(A)(2) of the Texas Miscellaneous Corporation Laws Act. Defining corporations and setting the rules and regulations thereof, has always been a matter of state law.

USAA argues that Carden v. Arkoma Associates, 494 U.S. 185, 110 S.Ct. 1015

(1990) stands for the proposition that federal courts should not look beyond the issue of whether an entity is, or is not, a corporation under state law for purposes of the diversity determination and may not take a "functional approach" to the determination. Under Carden, as interpreted by USAA, if a business entity has been organized as a corporation under state law, then a corporation it is for diversity purposes. If it is not a corporation, USAA claims that Carden says the rules regarding association citizenship apply. Even assuming that to be the rule of Carden, diversity jurisdiction exists because USAA is, by definition, a corporation.

Since the 1987 amendment to the Texas corporations code, it has been clear that, under Texas law, a reciprocal

interinsurance exchange such as USAA is a corporation. Article 1302-1.03 of the Texas Miscellaneous Corporation Laws Act provides that the Texas Business Corporation Act shall govern all domestic corporations organized under any statute of the State. Tex. Rev. Civ. Stat. Ann. art. 1302-1.03 (Vernon Supp. 1991); see also Tex. Bus. Corp. Act, art. 9.14 (Vernon Supp. 1991)(making Act applicable to any domestic corporation organized under any state statute). As stated in Article 1302-7.06(A)(2) of the Texas Miscellaneous Corporation Laws Act:

> "'Corporation' means: (a) Any corporation, **association**, or other organization incorporated or **organized** under . . . **the Insurance Code** . . . "
>
> (Emphasis added.)

Texas deems reciprocal interinsurance exchanges to be corporations. (Article 1302-7.06(A)(2) of the Texas Miscellaneous Corporation Laws Act.) For diversity purposes, federal courts are required, under Carden, to follow this designation and treat a reciprocal exchange as a corporation -- that is, a citizen of its state of organization and the state in which it locates its principal place of business. USAA, organized under the Texas Insurance Code and having its principal place of business in San Antonio, Texas, is a citizen of the state of Texas; therefore, there is complete diversity between the Waters and USAA and denial of the motion to dismiss was proper.

In some cases, USAA has actually

filed actions in Federal Court, claiming it was a corporation. In other cases, USAA was sued in Federal Court and, in its responsive pleadings, admitted to being a corporation. In yet other cases, USAA removed actions filed in state court to Federal Court, claiming diversity of citizenship on the basis that USAA is a corporation. Only when the Federal Court rulings, judgments or determinations were adverse to it did USAA suddenly claim that it was not a corporation and seek dismissal. When, however, the Federal Court case went well for USAA, it silently accepted the benefits of its jurisdictional manipulations and raised no jurisdictional objection. Now that USAA does not want to be in Federal Court in this case, it again objects to jurisdiction without disclosing to this

Court the fact that it has, itself, on numerous occasions, claimed to be a corporation.

Thus, as the result of its own admissions, as the result of its own affirmative conduct in seeking federal diversity jurisdiction, as a the result of Texas law defining USAA to be a corporation and under Carden, the District Court properly found and determined that USAA was subject to federal diversity jurisdiction in this matter. Accordingly, the foundational, substantive, basis for USAA's petition is without merit and the petition should be denied.

3.

EXTRAORDINARY RELIEF IS UNWARRANTED BECAUSE USAA WILL NOT BE IRREPARABLY HARMED BY WAITING FOR FINAL JUDGMENT

Even more devastating to USAA's arguments than the lack of merit on the jurisdictional issue, USAA's petition presents no sufficient basis for the extraordinary relief requested.

There must be some extraordinary reason for the request for writ relief. (Roche v. Evaporated Milk Association, 319 U.S. 21 (1943).) A writ of mandamus cannot issue upon a simple showing of error. Rather, there must be a showing that the right to issuance of the writ is clear and indisputable, that direct appeal is an inadequate means of obtaining the relief sought and that the

damage or prejudice to that party will not be correctable on appeal. (Will v. Calvert Fire Ins. Co., 437 U.S. 655 (1978); Kerr v. United States District Court, 426 U.S. 394 (1976); Bauman v. United States District Court, 557 F.2d 650 (9th Cir. 1977).) USAA cannot meet those tests and its petition should therefore be summarily denied.

First, USAA's right to issuance of the writ is not clear and indisputable in this case. As discussed above, there are several proper grounds upon which the District Court's exercise of diversity jurisdiction over USAA can be upheld.

Second, USAA cannot show that direct appeal is inadequate or that it will suffer irreparable harm if a writ is not issued. USAA asserts the following claims of prejudice and irreparable harm:

A. USAA claims in its application that, absent a stay, it will have to manage its 15,000-case docket under conflicting jurisdictional rules. However, USAA's own evidence at the sanctions hearing belies its claim of prejudice here.

At the sanction hearing, USAA's own employee testified that while USAA is involved in approximately 15,000 lawsuits at any given time, the vast majority of those actions are actions against USAA's insureds and do not involve USAA directly. Indeed, USAA's employee testified that in less than 1000 of the cases is USAA an actual party. Even in those actions, many are direct actions against USAA in place of its insured and diversity jurisdiction is not an issue. (28 U.S.C. section 1332(c)(1).) Thus,

there are few cases in which this jurisdictional issue even arises. USAA's attempt to obtain extraordinary relief of the basis of this less-than-forthcoming representation is an illuminating example of USAA's litigation style.

Moreover, even were USAA's representation true that the jurisdictional issue affects 15,000 of its cases, that is simply not a showing of irreparable harm sufficient to justify a writ. Even if USAA is required to respond to complaints or is required to file actions during the pendency of this Court's review, it can remain in, or file in, state court since state court will always have jurisdiction of the matters in a diversity case. If an action is filed in Federal Court, USAA may notice its motion to dismiss based on its

assertion that it is an unincorporated association. Further, the District Court's denial of the motion to dismiss was not published. Since it could be used, at most, as persuasive authority (Starbuck v. City and County of San Francisco, 556 F.2d 450 (1977)), USAA is not placed in any kind of immediate peril by the existence of the District Court's opinion pending the determination of the writ petition.

Finally, writ relief is not necessary because direct appeal is an adequate means of obtaining relief. Interlocutory review is not to be granted in ordinary actions that can be tried on their merits in a few days. (Cardwell v. Chesapeake & Ohio Railway, 504 F.2d 444 (6th Cir. 1974).) As noted, this action can be tried in a few days. All the

issues, including jurisdiction, sanctions and the bad faith judgment itself, can be resolved and one appeal taken from the final judgment. Denying appellate review now will not foreclose USAA's right to challenge jurisdiction after final judgment. Nothing will be lost and, should USAA come to its senses in the meantime and settle this action, much will be gained by preventing the waste of judicial resources by precluding USAA's ability to further delay this action now.

As noted by the District Court in denying certification for interlocutory appeal, it would be most efficient to "package" all the issues for a single appeal, including the jurisdictional issue, the sanctions issue and the determination of the action on its merits. To that end, the District Court

advanced the trial date of this action to June, 1992. Only at USAA's request was that trial continued to October, 1992. Since all the issues can be determined after final judgment, and nothing will be lost to USAA, interim review is simply not warranted or justified.

4.

CONCLUSION

USAA has failed to provide any justifiable basis for invoking the extraordinary remedy of interim review in this case. USAA has presented no factual or legal arguments which justifies this Court impeding the normal progress of this action. Indeed, USAA's petition is nothing more than further evidence of its hardball tactics which will burden this

Court and the litigants without dealing with the merits of a case. Having failed to supply any adequate justification for the requested relief, USAA's petition for writ of mandamus or other relief should be denied.

Dated this 22 day of May, 1992 at Claremont, California.

SHERNOFF, BIDART & DARRAS

By: _____
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Attorneys for Plaintiff

Supreme Court, U.S.
FILED
JUN 8 1992
OFFICE OF THE CLERK

No. 91-1707

In The

Supreme Court of the United States

October Term, 1991

IN RE

UNITED SERVICES AUTOMOBILE ASSOCIATION,

Petitioner

On Petition For Writ Of Mandamus, Prohibition Or Other Appropriate Remedy To The United States District Court Central District Of California

PETITIONER'S REPLY MEMORANDUM

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I.

WATERS' OPPOSITION SHOULD BE IGNORED BECAUSE IT INJECTS MATTERS OUTSIDE THE RECORD

Rule 28 of the Federal Rules of Appellate Procedure require that facts stated in appellate briefs be supported by "appropriate references to the record." Rule 28(e) provides that the record on appeal is contained in an "appendix" to be filed with the brief of the appellant. Likewise, Rule 20.3(a) essentially provides that the appendix to a writ petition comprises the record for purposes of petitioning for extraordinary writ.

In their opposition, Real Parties in Interest ["WATERS"] seek to obfuscate the *issues* raised in the petition for writ of mandamus *by injecting matters and "testimony" totally outside the record before this court*. For example, WATERS refer to testimony at a sanctions hearing on May 14 and 15, 1992, but fail to provide the court with any record to support their biased assertions. (Water's Opposition to Petition for Writ of Mandamus . . . dated May 22, 1992, at pp. 3, 17.)

II.

THE OPPOSITION SHOULD BE IGNORED AS IT FAILS TO CITE OR DISCUSS *TUCK v. USAA* AND *BAER v. USAA*, THE ONLY TWO FEDERAL DECISIONS DIRECTLY ON POINT

Nowhere in WATERS' twenty-two page Opposition to USAA's Petition for Writ of Mandamus do WATERS cite or attempt to distinguish *Tuck v. United Services Auto. Assn.*, 859 F.2d 842 (10th Cir. 1988) cert. den. 489 U.S. 1080

(1989) or *Baer v. United Services Auto. Assn.*, 503 F.2d 393 (2d Cir. 1974). In *Tuck* and in *Baer* federal appeals courts ruled that USAA, the very litigant involved in this case, is not a corporation and cannot be sued in federal court pursuant to federal diversity jurisdiction. (*Tuck, supra,* 859 F.2d 844 to 845; *Baer, supra,* 503 F.2d at 395.)

Since the Opposition to the Petition for Writ of Mandamus fails to discuss or distinguish the two dispositive cases holding squarely that this litigant, USAA, is *not a corporation* and cannot be sued as a corporation pursuant to diversity jurisdiction, the brief in opposition to the petition for writ filed by WATERS is incomplete, unpersuasive, and must be ignored.

III.

WATERS' ARGUMENT THAT USAA IS A CORPORATION UNDER TEXAS STATE LAW MUST BE SUMMARILY REJECTED

WATERS' argument that USAA is a corporation under Texas state law must be summarily rejected because it has been judicially determined that USAA is *not* a corporation for diversity purposes. (*Tuck, supra,* 859 F.2d at 844 to 845; *Baer, supra,* 503 F.2d at 395.) In fact, the Court of Appeals in *Baer* examined the statutes of the State of Texas and specifically determined that USAA was not a corporation under the laws of the State of Texas.

Moreover, WATERS themselves never alleged in their complaint that USAA was "a corporation" under the laws of Texas or any other authority. (See, Waters' Complaint at A-34 ("Defendant, UNITED SERVICES AUTOMOBILE

ASSOCIATION ("USAA"), is, and at all times herein mentioned was a domestic reciprocal insurance company with its principal place of business in the State of Texas.").)

WATERS' argument in Opposition to the Petition for Writ, that USAA is a corporation for diversity purposes, is erroneous, misleading and incomplete. This precise issue was considered on its merits by Judge Nelson of the Ninth Circuit Court of Appeals and was emphatically rejected. (See Appendix at pp. A-15 to A-17.) Indeed, WATERS have not cited a single Texas case to support their assertion that Texas law deems inter-insurance exchanges to be corporations. WATERS have, moreover, failed to advise this Court that Texas case authority is to the contrary. (See, e.g., *Highway Ins. Underwriters v. Reed*, 221 S.W.2d 925, 926 (Tex.Civ.App. 1949).)

IV.

CONCLUSION

The District Court's incorrect imposition of diversity jurisdiction in this case cannot await reversal on appeal. USAA and other reciprocal insurance associations are left by the District Court's decision in grave jeopardy.

The plea for the urgent need for mandamus relief is poignantly stated in the impartial observation of Circuit Judge Nelson:

> "For the reasons stated above, I believe that *USAA* has stated not only a justiciable claim for extraordinary relief by mandamus, it *has stated a compelling case* for our doing so. The inevitably futile result which will follow months from now

dictates that we rule on the jurisdictional issue at this point, rather than many months and much labor from now." (Appendix to Petition for Writ of Mandamus at p. A-19, emphasis added.)

DATED: June 8, 1992.

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